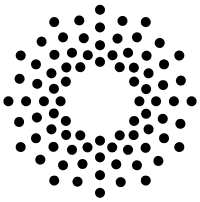

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The Barrie Guide to Tort 2020
Volume Two

Nervous Shock
Private Nuisance
Occupiers' Liability

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CONTENTS

SECTION ONE: NERVOUS SHOCK

SECTION TWO: PRIVATE NUISANCE

21 INTRODUCTIONS AND DEFINITIONS

22 WHO CAN SUE FOR NUISANCE?

i. The general rule

ii. An attempt to overturn the general rule

iii. Restoring the rule

iv. The claimant must have an interest in the affected land

23 THE POSSIBLE DEFENDANTS: THE PERSON WHO IS CREATING OR HAS CREATED THE NUISANCE

24 THE POSSIBLE DEFENDANTS: THE OCCUPIER OF THE LAND

25 THE POSSIBLE DEFENDANTS: THE LANDLORD OF THE PERSON WHO IS CREATING THE NUISANCE

i. Authorising a tenant to create a nuisance

ii. Some quirky cases

iii. Committing the nuisance in the capacity of being a tenant

iv. Liability towards one's own tenants: *Caveat Lessee*

26 AN UNREASONABLE INTERFERENCE WITH THE ENJOYMENT OF LAND

i. Noise: the racing stadium cases

ii. Noise: the upstairs neighbours cases

iii. Smells

iv. Vibrations

v. Natural encroachments

vi. Sex establishments

vii. Dust

27 INTERFERENCE WHICH DOES NOT USUALLY CONSTITUTE AN ACTIONABLE NUISANCE

i. Interference with television signals

ii. Right to a view (sometimes called 'a prospect')

iii. Right to air-flow

iv. Right to light

v. Overlooking other people's property

SECTION THREE: OCCUPIERS' LIABILITY

SECTION ONE: NERVOUS SHOCK

1 THE POLICY OF LIMITATION

1.1 Where a claimant suffers **physical injury,** he may claim also for any **mental injury** under the heading of 'pain and suffering'.

1.2 However, where he suffers **ONLY** mental injury without any physical injury, his claim is much more limited. This is an issue of **DUTY OF CARE**. For purely policy reasons, the courts have restricted claims for pure psychiatric illness (nervous shock) with a set of special 'control mechanisms'.

1.3 It has been clear since *Dulieu v. White* (1901) 2 KB 669 that a negligent act or omission which causes pure nervous shock may be actionable in damages, but such actions have been severely limited in two ways.

1. The claimant must prove that he has been caused to suffer from a recognised **psychiatric** illness, rather than mere grief or anxiety

2. He must also prove that he was owed a duty of care by the defendant, and in nervous shock cases the courts have imposed limitations far more strict than mere 'reasonable foreseeability.'

1.4 In *White v. Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) Lord Steyn explained the policy reasons for these limitations.

White v. Chief Constable of South Yorkshire Police [1999] 2 AC 455 (HL)

"In an ideal world all those who have suffered as a result of the negligence ought to be compensated. But we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for consideration as well as to the heads of recoverable damages. This results, of course, in imperfect justice but it is by and large the best that the common law can do. The application of the requirement of reasonable foreseeability was sufficient for the disposal of the resulting claims for death and physical injury. But the common law regards reasonable foreseeability as an inadequate tool for the disposal of claims in respect of emotional injury. There are at least four distinctive features of claims for psychiatric harm which in combination may account for the differential treatment.

"Firstly, there is the complexity of drawing the line between acute grief and psychiatric harm. The symptoms may be the same. But there is greater diagnostic uncertainty in psychiatric injury cases than in physical injury cases. The classification of emotional injury is often controversial. In order to establish psychiatric harm expert evidence is required. That involves the calling of consultant psychiatrists on both sides. It is a costly and time-consuming exercise. If claims for psychiatric harm were to be treated as generally on a par with physical injury it would have implications for the administration of justice. On its own this factor may not be entitled to great weight and may not outweigh the considerations of justice supporting genuine claims in respect of pure psychiatric injury.

"Secondly, there is the effect of the expansion of the availability of compensation on potential claimants who have witnessed gruesome events. I do not have in mind fraudulent or bogus claims, but I do have in mind the unconscious effect of the prospect of compensation on potential claimants. Where there is generally no prospect of recovery, such as in the case of injuries suffered in sport, psychiatric harm appears not to obtrude often. On the other hand, in the case of industrial accidents, where there is often a prospect of recovery of compensation, psychiatric harm is repeatedly encountered and often endures until the process of claiming compensation comes to an end. The litigation is sometimes an unconscious disincentive to rehabilitation.

"The third factor is important. The abolition or a relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages in tort.

"Fourthly, the imposition of liability for pure psychiatric harm in a wide range of imposition of situations may result in a burden of liability on defendants which may be disproportionate to tortious conduct involving perhaps momentary lapses of concentration, e.g. in a motor car accident."

per Lord Steyn at p.493

2 DEFINING NERVOUS SHOCK

2.1 The first thing for the claimant to establish in any case is that the injury he has suffered is actually 'nervous shock'. This expression has no medical meaning, but embraces many psychiatric injuries, including depression, post traumatic stress disorder, paranoia and schizophrenia, provided that the illness has been triggered by witnessing or experiencing a traumatic event. However, mental distress and grief caused by a negligent act are not, in themselves, enough to give rise to a cause of action.

2.2 In a famous *obiter dicta* in *Hinz v. Berry*, Lord Denning confirmed that when you are claiming for 'pure' nervous shock (i.e. not the result of a physical injury) then you must prove that you have suffered a recognised psychiatric illness.

2.3 **Hinz v. Berry [1970] 2 QB 40 (CA)**

Evelyn Hinz, who was two months pregnant, was picnicking in a lay-by with her husband, four children and four foster-children. She crossed the road to pick bluebells with one of the children, when an out of control Jaguar, driven by Anthony Berry, ran into the rest of the family, killing her husband and injuring her children.

Prior to the accident she had been a happy and robust woman. Afterwards, she suffered prolonged morbid depression. She was awarded £4,000 in damages for nervous shock.

The defendant's insurance company took the case to the Court of Appeal to challenge the amount of damages. (This was a test cae. It was not that the insurance company necessarily thought that the award was unfair: they just needed a definitive statement of quantum in order to fix premiums etc. in the future. Note that they did not challenge the liability of their client, even though they may have had a very good case to do so.)

The CA upheld the award, though conceding it was rather high, on the basis that it was within the bounds of reasonableness, and applying the principle that an appeal court should only overturn a decision based on reasonableness if that decision is wholly erroneous by any normal standards.

More significantly, Lord Denning took the opportunity to emphasise in an *obiter* that damages in such cases could only be awarded for actual psychiatric illness.

"In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or to put it in medical terms, for any recognised psychiatric illness caused by the breach of duty by the defendant."

per Lord Denning M.R. at p.42

2.4 **McLoughlin v. O'Brian [1983] 1 AC 410 (HL)**

"The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness." per Lord Bridge at p.431

"Although we continue to use the hallowed expression 'nervous shock', English law and common understanding have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is known about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the sense, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact." per Lord Wilberforce at p.418

2.5 **Re Herald of Free Enterprise Arbitration (1987) The Independent Dec. 18 1987**

As a result of the captain's negligence in leaving the bow doors open, The Herald of Free Enterprise capsized just after leaving Zeebrugge harbour. 193 people were killed. Some people witnessed the death and suffering of loved ones. Others spent hours in the water fearing death. The arbitration gave rise to an extensive consideration of 'pathological grief' meaning grief beyond the normal symptoms of bereavement.

The arbitrators, using the Diagnostic and Statistical Manual of Mental Disorders as a guide, found that both PTSD and Pathological Grief are recognised psychiatric illness, and allowed claims based on these illnesses.

However, they noted the particular difficulty in assessing these claims: *"In each case we have had to estimate the extent to which the claimant's grief is in excess of the normal grief which the claimant would have suffered had the death occurred in ordinary circumstances and compensate the claimant accordingly."*

2.6 **Attia v. British Gas [1988] QB 304 (CA)**

"Judges have in recent years become increasingly restive at the use of this misleading and inaccurate expression, and I shall use the general expression 'psychiatric damage' intending to comprehend within it all relevant forms of mental illness, neurosis and personality change."

per Bingham LJ at p.317

2.7 **Alcock v. Chief Constable of South Yorkshire Police [1992] 1 AC 310 (HL)**

"I have used the expression 'nervous shock' at the outset because it has been used in many earlier cases. It is, however, necessary at once to point out that that which attracts damages is not the shock itself but any recognisable psychiatric illness or disorder resulting from the shock which, in appropriate cases, has that effect." per Parker LJ at 351 (in the Court of Appeal)

2.8 **Hicks v. Chief Constable of South Yorkshire Police [1992] 1 AC 310 (HL)**

The House of Lords rejected claims brought in respect of the likely terror suffered by two girls who died in the Hillsborough disaster, and for the pain and suffering they experienced as they died. This was partly because there were only minutes between their perception of the danger and their deaths, so there could be no evidence of a psychiatric injury. Fear, by itself, could not sustain a claim.

"It is perfectly clear law that fear by itself, of whatever degree, is a normal human emotion for which no damages can be awarded. Those trapped in the crush at Hillsborough who were fortunate to escape without injury have no claim in respect of the distress they suffered in what must have been a truly terrifying experience. It follows that fear of impending death felt by the victim of a fatal injury before that injury is inflicted cannot by itself give rise to a cause of action which survives for the benefit of the victim's estate." per Lord Bridge at p.314

2.9 **Reilly v. Merseyside Regional Health Authority [1994] 23 BMLR 26 (CA)**

A husband and wife were trapped in a lift on a visit to a hospital, and suffered severe claustrophobia. It was held that the unpleasant feelings they felt amounted to no more than ordinary human emotions, rather than psychiatric illness. They were thus unable to claim damages.

2.10 Note that in some of the cases, the claimant has suffered a physical injury *as a result of* the nervous shock: e.g. when the shock has caused a miscarriage. This still counts as a 'pure' nervous shock case, so the mental injury itself needs to be psychiatric.

2.11 However, if the claimant has suffered a mental injury *because of* the physical injury, however, they can claim for this as 'general damages', even if it only amounts to upset: it does not need to amount to a psychiatric illness.

2.12 Note also that the Fatal Accidents Act 1976 provides that the spouse of an accident victim (or the parents of an unmarried minor) may claim statutory damages for bereavement.

3. THE DEVELOPMENT OF THE LAW

3.1 There are now **three** leading House of Lords cases on the limits of the duty of care for causing pure nervous shock.

Alcock v. Chief Constable of South Yorkshire Police **[1992] 1 AC 310 (HL)**

Page v. Smith **[1996] AC 155 (HL)**

White v. Chief Constable of South Yorkshire Police **[1999] 2 AC 455 (HL)**

3.2 These cases are best understood by considering the cases that preceded them in defining the limits of liability for causing pure nervous shock.

i. Originally there was *no* liability for causing someone nervous shock though negligence

3.3 Early claims for non-physical injuries were barred on the basis of the floodgates policy. There was a particular danger of a multitude of claims – and of fraud – before there were reliable methods of diagnosing psychiatric illness.

3.4 **Victorian Railway Commissioners v. Coultas (1888) 13 App Cas 222 (Privy Council: Australia)**

The gate-keeper of a railway company had negligently invited the plaintiffs to drive their buggy over a railway line when there was a train approaching. The train narrowly missed the buggy, but Mary Coultas, thinking she was going to be killed, fainted into her brother James's arms, and suffered subsequent illness as a result of the shock.

Although she was awarded £400 in damages by the jury, the claim was overturned by the Privy Council. The Privy Council. said that the damage to the plaintiff must be the *"natural and reasonable result of the defendant's act"* and held that:

"Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper." per Sir Richard Couch at p.225

The court thought that such an extension of liability would give rise to a great increase in claims: *"and a wide field opened for imaginary claims."* per Sir Richard Couch at p.226

ii. There *was* liability for causing nervous shock *deliberately*

3.5 Where the defendant had deliberately set out to shock the victim, he could be liable in an action akin to assault and battery. This was known as the tort of *Wilkinson v. Downton* (after the leading case). Note that this was not an action in negligence, which was not compensable at the time of the case.

3.6 **Wilkinson v. Downton [1897] 2 QB 57**

A practical joker told a woman that her husband, Thomas Wilkinson, had broken both his legs in an accident at the races in Harlow and that he required her to fetch him home in a cab with two pillows. This not particularly funny falsehood caused the woman to suffer severe nervous shock. Her hair turned white and she entailed weeks of suffering and incapacity as well as medical bills.

She successfully claimed £100 in compensation for her illness (plus 1s. $10^{1/2d}$. in train fares!) It was held that the **wilful** act of the defendant, being calculated to cause physical harm to the plaintiff, gave rise to a claim in damages for the psychiatric harm done.

3.7 **Janvier v. Sweeney [1919] 2 KB**

During World War I, Mlle Janvier lived in Mayfair and corresponded with her German lover who was interned as an enemy alien on the Isle of Man. Sweeney was a private detective who wanted secretly to obtain some of Janvier's employer's documents. He sent his assistant to induce Janvier to co-operate by pretending to be from Scotland Yard and claiming that she was wanted for corresponding with a German spy. She suffered severe nervous shock and was awarded £250.

3.8 The modern relevance of *Wilkinson v. Downton* was questioned in *Wainwright v. Home Office* [2003] 4 All ER 969 (HL).

Wainwright v. Home Office [2003] 4 All ER 969 (HL)

Alan Wainwright went to visit his half-brother, Patrick O'Neill, at Armley Prison in Leeds. Because the prison authority suspected O'Neill (who was on remand for murder) of dealing in drugs, the governor gave instructions that all his visitors should be stripped searched on the way in. The Wainwrights objected to this, but were told that they would not be permitted to visit Patrick unless they complied. Alan (then aged 22) suffers from cerebral palsy and severe arrested social and intellectual development.

There is a Code of Practice for conducting strip searches, which includes not requiring the subject to take everything off at once, and having no physical contact below the neck. Somewhat contrary to this, the police officers forced Alan to strip naked, poked him about and then fiddled with his bits, looking for drugs where they were most unlikely to be concealed. Alan was so traumatised by this that he suffered from PTSD as a result. (His mother had a similar experience **–** in front of an uncovered window where people could look in.)

It was only after thus abusing him that the prison guards brought in a consent form for Alan to sign. He explained that he could not read and wanted his mother there to read it to him. The guards ignored this and said if he did not sign, he would not be able to visit his brother. So, he signed... and sued…

The judge at first instance considered Alan's case to be equivalent to *Wilkinson v. Downton* [1897] in that a trespass to the person (a battery) had occurred leading to nervous shock, and awarded him £4,500 damages for the battery and for his having been caused nervous shock by it. The judge thought that both the order to strip and the intimate touching were both acts of battery.

The Court of Appeal did not consider that apart from the physical battery, the prison officers had committed any actionable wrong, and so reduced the damages to £3,750 to account only for the unlawful touching but not the order to strip nor the psychiatric injury.

The House of Lords, agreeing with the Court of Appeal, held that the order to strip was not in itself a battery, no more than was the lie told in *Wilkinson v. Downton.* Indeed, Lord Hoffmann opined that *Wilkinson v. Downton* has no leading role in modern law at all. Although the touching of his penis had technically been a battery **–** for which Alan was well compensated **–** there was no intention by the officers to cause him any injury. Any action for that injury should therefore lie in negligence, but the most that was foreseeable was that he might suffer some humiliation or distress, not a physical injury or a psychiatric illness, so the action on that ground would fail.

"In the present case, the judge found that the prison officers acted in good faith and that there had been no more than 'sloppiness' in the failures to comply with the rules. The prison officers did not wish to humiliate the claimant... The only inexplicable act was the search of Alan's penis, which the prison officers were unable to explain because they could not remember having done it. But this has been fully compensated." per Lord Hoffman at para 50

3.9 The Wainwrights had more success in the ECHR. This is discussed below at para 19.2.

iii. Duty owed in negligence to a primary victim *only*: the Kennedy Limitation

3.10 In *Dulieu v. White* (1901), Kennedy J. recognised that there could be an actionable case in negligence where the defendant has given the victim the reasonable impression that they are about to be physically injured, and this sudden apprehension of danger gave the victim a foreseeable psychiatric injury, even though they in fact escaped direct physical injury.

3.11 **Dulieu v. White [1901] 2 KB 669**

This was the first case in negligence where nervous shock was successfully pleaded. A horse-drawn van crashed through the window of a pub, giving the publican's pregnant wife such a severe shock that she became seriously ill and gave premature birth to a child, who was born 'an idiot'.

Damages were awarded, but the scope of such liability was limited by Kennedy J.

"There is, I am inclined to think, one limitation. Shock, when it operates through the mind, must be shock which arises from a reasonable fear of immediate personal injury to oneself."

per Kennedy J. at p.675

This case thus distinguished between persons who were in fear for their own safety (now called 'primary victims') and those who suffer shock on seeing other people's accidents or injuries (now called 'secondary victims').

3.12 n.b. The expression 'primary victim' is sometimes use to describe a person who is physically injured when this is witnessed by a loved one – called a 'secondary victim'. As this can be rather confusing, it is generally better to call the person who is physically injured an 'immediate victim' rather than a 'primary victim'.

iv. Duty recognised in negligence to a secondary victim

3.13 In 1925, the Court of Appeal permitted a claim based on the psychiatric injury caused at seeing a loved one in mortal danger. This was the first case that recognised the claim of a secondary victim.

Hambrook v. Stokes Bros. [1925] 1 KB 141 (CA)

The Court of Appeal rejected the 'Kennedy Limitation'. A pregnant mother saw a lorry without a driver careering down a hill towards her children. Although the children were out of her sight, round a bend, she knew that they were in the path of the lorry. She was told immediately that a child had been knocked down, and later saw her injured daughter at the hospital. She suffered nervous shock, had a miscarriage and eventually died. Her claim for damages succeeded. The court thought it would be absurd to deny a remedy to a "courageous and devoted" mother who feared for the safety of her children, when she would have been successful if she had feared for her own safety.

"I can find no principle to support the self-imposed restriction stated in the judgment of Kennedy J. in Dulieu v. White & Sons... It would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not... In my opinion such distinctions would be discreditable to any system of jurisprudence."

per Atkin LJ at p.157

3.14 The case of a secondary victim was arguably taken too far in a curious case in 1938.

Owens v. Liverpool Corporation [1938]1 KB 394 (CA)

Relatives of William Owens, deceased, suffered severe shock during his funeral procession when the defendant's tram driver negligently collided his tram into the hearse, breaking the glass side and upsetting the coffin. This was odd since the plaintiffs could not have feared for the safety of the deceased, and so were really no more than spectators.

This case was disapproved of by three members of the House of Lords in *Bourhill v. Young* [1943] AC 92 and again by Lord Oliver in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

v. Secondary victim duty denied to a mere bystander

3.15 The duty of care owed to a secondary victim was restricted to those who had close ties of love and affection with the immediate victim. This was part of the floodgates policy, as it is reasonably foreseeable that anybody might be shocked at the sight of an horrific accident, but it would be disproportionate and impractical to make the tortfeasor liable to everyone who might have seen the accident: in these days of mass media, there could be countless people watching a live event which goes horribly wrong!

3.16 However, the basis of the judgment which supposedly initiated this policy was actually about something else! Indeed, lawyers are still arguing about what the *ratio* of *Bourhill v. Young* actually was!

3.17 **Bourhill v. Young [1943] AC 92 (HL)**

A pregnant fishwife (a woman who sold fish, rather than a harridan!), who had just alighted from a tram, heard the impact of a motorcycle accident 50 yards away, out of her line of vision. She walked over to investigate and was so shocked by what she saw that she suffered a miscarriage. She sued the estate of the motorcyclist for her nervous shock.

HELD: She was not entitled to damages. Three judges emphasised that she was out of the area of impact, and two that, being a total stranger to the motor-cyclist, she was outside his area of foresight. It was also decided that as a pregnant woman she was not of normal fortitude.

The *ratio* of this much-criticized decision is thus not clear, though it clearly limited the scope of *Hambrook v. Stokes*.

"It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm." per Lord Porter at p.117

3.18 In *Greatorex v. Greatorex* [2000] 1 WLR 1970, the court held that it would be contrary to public policy to permit the claim of a secondary victim whose shock was caused by seeing the injuries to the tortfeasor who was responsible for the accident in the first place. This would have been another reason for Mrs. Bourhill's claim to fail. This is discussed below.

vi. Duty extended to secondary victims who have become unwillingly involved in causing the injuries to the immediate victim

3.19 The negligence of the tortfeasor might result in someone else being involved in causing an accident. For example, if a mechanic fixes the brakes on a car incorrectly, the driver might end up killing a pedestrian, and suffer shock because of his innocent participation in the death. Similarly, if someone negligently pushes a commuter into the path of an incoming tube-train, the blameless drier might well suffer a shock, even though he or she is completely innocent, and even though he or she has no prior acquaintance with the immediate victim.

3.20 In *Dooley v. Cammell Laird & Co Ltd.* [1951] the court permitted a claim by a crane driver against his employer who had supplied him with faulty equipment that caused injury to his colleagues. The driver had no fears for his own safety, but thought he had inadvertently killed his colleagues because of the fault, and whilst he did not suggest that he had a close tie of love and affection with them, his unwilling involvement in the accident justified the success of his claim.

3.21 **Dooley v. Cammell Laird & Co Ltd. [1951] 1 Lloyd's Rep 271**

In an extension to the scope of liability for nervous shock, the court allowed the claim of a crane driver who suffered sciatica and nervous shock when he saw a rope on his crane snap, causing a heavy load to fall into the hold of the ship where he knew his fellow workmen were working.

"If the driver of the crane concerned fears that the load may have fallen upon some of his fellow workmen, and that fear is not baseless or extravagant, then it is, I think, a consequence reasonably to have been foreseen that he may himself suffer a nervous shock. I therefore think there was a duty upon Mersey Insulation towards Dooley to use a sound rope." per Donovan J at p.277

3.22 This case was reexamined and explained in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL), where Lord Jauncey stated that the reason for the judgment was that the crane driver thought that he was responsible for causing the death and injuries to his workmates. The case is now considered to be one about an 'active participant' – a special kind of primary – rather than secondary – victim.

vii. Apparent inconsistency over duty to secondary victims

3.23 In *King v. Phillips*, Lord Denning put a surprising restriction on the scope of the duty of care owed to a secondary victim.

King v. Phillips [1953] 1 QB 429 (CA)

A taxicab driver backed his cab into a small boy on a tricycle. The damage to the boy and his tricycle was slight, but his mother heard him scream and, looking out of an upstairs window some 70 yards away, saw the tricycle under the cab, but could not see the boy. She presumed her son had been injured, and suffered nervous shock. Following *Bourhill v. Young* (1943) the court denied her a remedy because no 'hypothetical reasonable observer' could reasonably or probably have anticipated that the careless backing of a taxi could have caused injury **–** either physical or nervous **–** to her. The court distinguished *Hambrook v. Stokes Brothers* (1925).

"I think that we should follow Hambrook v. Stokes Brothers so far as to hold that there was a duty of care owed by the taxi driver not only to the boy, but also to his mother. In that case the negligence took place 300 yards from the place where the mother was standing. In this case it was only 70 or 80 yards. In that case the mother was not herself in any personal danger. Nor was she here. In that case she suffered shock by fear for the safety of her children from what she saw and heard. So did she here...

"Nevertheless, I think that the shock in this case is too remote to be a head of damage. It seems to me that the slow backing of the taxicab was very different from the terrifying descent of the runaway lorry. The taxicab driver cannot reasonably be expected to have foreseen that his backing would terrify a mother 70 yards away, whereas the lorry driver ought to have foreseen that a runaway lorry might seriously shock the mother of children in the danger area." per Denning LJ at p.441

3.24 This case was expressly disapproved of in *Page v. Smith* [1996] 1 AC 155 (HL). Lord Lloyd called Denning L.J.'s decision 'indefensible'. To what extent was it simply a policy decision?

3.25 In *Boardman v. Sanderson*, a case with some similar facts to *King v. Phillips*, the Court of Appeal had no difficulty in awarding damages to a parent who thought his out-of-sight child was being injured.

Boardman v. Sanderson [1964] 1 WLR 1317 (CA)

A father and his eight-year-old son went with the father's friend, John Sanderson, to a garage to collect Sanderson's car in which they were all going to go to Blackpool for a holiday. The father went to the garage office to pay the bill whilst the friend backed his car out of the garage. In doing so he negligently ran over the foot of the child who was standing playing with the air compressor. The father heard his son scream and went to his aid.

The father later suffered nervous shock. He was awarded £75. The defendant appealed on the grounds that the father was not a foreseeable victim of the negligence. The Court of Appeal upheld the father's claim.

"I think I need say no more than that if the facts of this particular case are fitted to the concept of negligence, it is clear that a duty was owed by the defendant not only to the infant but also to the near relatives of the infant who were, as he knew, on the premises, within earshot, and likely to come upon the scene if any injury or ill befell the infant." per Ormerod LJ at p.1322

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viii. Duty extended to secondary victims who come to the rescue of immediate victims and are shocked by what they see

3.26 It is clearly foreseeable that if you create a danger or cause an accident, that people will come to the rescue, even if they have no training or experience.

Wagner v. International Railway Co (1921) 232 N.Y. 176

"Danger invites rescue. The cry of distress is the summons to relief... The act, whether impulsive or deliberate, is the child of the occasion." per Cardozo J at p.180

3.27 On that basis, in *Chadwick v. British Railways Board* [1967], the court recognised another kind of active participant – a rescuer who is drawn to the scene of an accident by his desire to assist the injured people, and who ends up suffering a shock at what he witnesses, even though the immediate victims are strangers to him.

3.28 **Chadwick v. British Railways Board [1967] 1 WLR 912**

A railway accident in Lewisham caused by the defendants killed 90 people. Henry Chadwick, a window-cleaner who was passing by, assisted the official rescue teams at the scene of the rail disaster, and as a result of witnessing the horrific sights he became psychoneurotic, even though he did not know the victims personally. The claim on his behalf by his widow succeeded.

"In the present case, the defendants were negligent towards their passengers. As a result, passengers were injured and put in peril. All that could reasonably have been foreseen. It could also be foreseen that somebody might try to rescue passengers and suffer injury in the process, and in my opinion the defendants owed a duty to Mr. Chadwick, who was within the area of contemplation."
per Waller J. at p.921

3.29 This judgment must now be read in the light of the explanation given of it by Lord Steyn in *White v. Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) discussed below.

ix. Duty extended to loved ones who see the *immediate aftermath* of an accident, rather than witnessing the accident itself.

3.30 **McLoughlin v. O'Brian [1983] 1 AC 410 (HL)**

A road accident involving a car, a lorry and an articulated lorry caused the death of a woman's young daughter and various injuries to her husband (the car driver) and other two children. Her friend who drove her to the hospital told her about the accident two hours later. At the hospital she was told of the death and saw the rest of her injured family. Her daughter Kathleen had her face cut and was begrimed with dirt and oil. Her husband was sitting with his clothes in tatters, covered in mud and oil. She suffered distress *'producing an effect going well beyond that of grief and sorrow.'*

The House of Lords unanimously upheld her claim against the lorry drivers. Although she was not at the scene of the accident, the *'recognisable psychiatric illness'* she suffered was a reasonably foreseeable consequence of the defendants' negligence.

Lord Wilberforce laid down three principles to be considered in deciding to whom a duty of care is owed in nervous shock cases:**–**

i) The duty is only owed to certain classes of persons, including parent/child and husband/wife, but not to the ordinary bystander. *"The closer the tie (not merely in relationship, but in care) the greater the claim for consideration."* per Lord Wilberforce at p.422

ii) The person suffering nervous shock must be close in both time and space to the accident, though not necessarily in direct and immediate sight and hearing. The 'immediate aftermath' will suffice, provided that the victim of the accident is still in the same state he was immediately after the accident (i.e. not cleaned up) when the relative sees him. In the case itself, two hours was reckoned to be soon enough to constitute 'immediate', but that does not mean that a longer period might not also be sufficient.

iii) The shock must generally be caused by first-hand experience of the calamity.

"The shock must come through sight and hearing of the event or of its immediate aftermath. Whether some equivalent of sight and hearing, e.g. through simultaneous television, would suffice may have to be considered." per Lord Wilberforce at p.423

x. Duty to primary victims subject to the 'egg-shell' skull rule

3.31 **Brice v. Brown [1984] 1 All ER 997**

The issue of 'normal fortitude' arose in the context of remoteness of damage. A neurotic woman suffered nervous shock when she and her nine-year-old daughter were involved in a minor road accident. The woman had a history of mental illness, but following the incident she became suicidal and began behaving in a bizarre and anti-social manner, resulting in her admission to a mental hospital. The plaintiff contended that although the extremity of her condition was unforeseeable, it was reasonably foreseeable that she would suffer some kind of nervous shock so the defendant was liable. The defendant contended that for a tortfeasor to be liable for nervous shock, the precise extent of the nervous shock had to be foreseeable.

HELD: As long as it was foreseeable that a person of normal phlegm would suffer *some* nervous shock, the plaintiff was entitled to damages for nervous shock and such of its direct consequences as were not dissimilar in type, whether initially foreseeable or not.

3.32 **Kralj v. McGrath [1986] 1 All ER 54**

Sally Kralj suffered nervous shock when she saw the dreadful state of her new-born child after a negligent delivery. The consultant obstetrician, without the use of anaesthetic, attempted to turn one of her unborn twins by manual manipulation of its head. This in itself was horrific and excruciatingly painful. His efforts were unsuccessful and the baby was delivered by Caesarean section. The baby (Daniel) suffered severe disabilities and died eight weeks later. Mrs. Kralj succeeded in her action and the court held that the damages for nervous shock could be increased to take account of her grief at the loss of the child.

"While damages for grief and suffering for the death of Daniel are not payable in the same way as I indicated when dealing with the question of aggravated damages, if the situation is one where the plaintiff's injuries have on her a more drastic effect than they would otherwise because of the grief which she is sustaining at the same time in relation to the death of a child who died in the circumstances in which Daniel died, that is something which the court can take into account."
per Woolf J at p.62

3.33 These cases must now be read in the light of the leading case of *Page v. Smith* [1996] 1 AC 155.

4 THE CURRENT LAW: Primary Victims

4.1 The usual meaning of 'primary victim' is someone who suffers nervous shock as a result of fearing for his or her own physical safety. As long as it is reasonably foreseeable that the victim might have suffered a physical injury as a result of the defendant's negligence, he or she can claim for the pure psychiatric injury actually suffered, even if that is not foreseeable. This is the principle in *Page v. Smith,* and puts 'primary victims' in a much stronger position than 'secondary victims'.

4.2 The definition of 'primary victim' has been extended in recent years to include people who do not fear for their own safety, but who have somehow participated in the incident. These people **–** such as rescuers **–** were previously seen as a special type of 'secondary victim' and so subject to the control mechanisms now described in *Alcock*. However, this reclassification has brought problems of its own!

4.3 n.b. 'Primary victim' is also sometimes used to describe the person in a secondary victim case who actually suffers the physical injury which leads the loved one to suffer the nervous shock. It is useful to call such people 'immediate victims' to avoid confusion!

i. The general rule of primary victims

4.4 The general principles relating to 'standard' primary victims can be found in the leading case of *Page v. Smith* [1996] 1 AC 155 (HL).

Page v. Smith [1996] 1 AC 155 (HL)

The plaintiff, who suffered from ME, found that his condition was much worsened after he was involved in a car accident for which the defendant was responsible. The court awarded him £162,153, but the Court of Appeal allowed an appeal on the ground that the plaintiff had suffered no physical injury, and it was not reasonably foreseeable that he would have suffered the psychiatric injury.

The House of Lords allowed the plaintiff's appeal (by a bare majority) holding that if the defendant causes the plaintiff reasonably to fear for his own physical safety (i.e. if the plaintiff is a 'primary victim'), it matters not whether the injury in fact sustained is physical, psychiatric or both: the plaintiff may claim for ALL the injuries he has suffered, even if it was not foreseeable that the victim would suffer ANY psychiatric harm. However, secondary victims (those who witness or come upon the scene of an accident) may not claim for psychiatric injury unless it was reasonably foreseeable.

"The following propositions can be supported.

1. In cases involving nervous shock, it is essential to distinguish between the primary victim and secondary victims.

2. In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim.

3. In claims by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is a primary victim.

4. Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric." per Lord Lloyd at p.197

4.5 Lord Lloyd did not consider that this would open the floodgates as the claimant would have to establish a real risk of physical injury for the claim to succeed.

ii. Primary victims and the 'thin skull rule'

4.6 Lord Lloyd's judgment represents an extension to the thin skull rule. The rule normally indicates that if the claimant has suffered a foreseeable physical injury, the defendant is liable for all the consequences of it, even if those consequences are not foreseeable in a person of normal fortitude.

4.7 Here, however, he seems to be going further by holding that a defendant will be liable to a primary victim for his nervous shock even though the victim has not suffered a physical injury and the nervous shock he has suffered is not just worse than expected but was not reasonably foreseeable at all. i.e. The injury suffered is not causally linked to any actual and foreseeable injury.

"Nor in the case of a primary victim is it appropriate to ask whether he is a person of 'ordinary phlegm'. In the case of physical injury there is no such requirement. The negligent defendant...takes his victim as he finds him. The same should apply in the case of psychiatric injury. There is no difference in principle... between an eggshell skull and an eggshell personality." per Lord Lloyd at 189

iii. The extent of the threat to a primary victim

4.8 In order to be a primary victim – in the *Page v. Smith* sense – it is clear that the claimant must first be in reasonable fear for his safety. This means that there must be a realistic threat of more than a mere trivial injury.

4.9 As Lord Lloyd states: *"Before a defendant can be held liable for psychiatric injury suffered by a primary victim, he must at least have foreseen the risk of physical injury. So that if, to take the example given by my noble and learned friend, Lord Jauncey of Tullichettle, the defendant bumped his neighbour's car while parking in the street, in circumstances in which he could not reasonably foresee that the occupant would suffer any physical injury at all, or suffer injury so trivial as not to found an action in tort, there could be no question of his being liable for the onset of hysteria."*
per Lord Lloyd at page189/190

4.10 This view is supported (by analogy) in *Grieves v. Everard* [2008] 1 AC 281 (HL). (See below)

4.11 In *Fryers v. Belfast* [2009] NICA 57, the NI Court of Appeal considered that even *actual* injuries of a trivial nature would not necessarily activate the thin-skull rule in relation to psychiatric injuries.

iv. Examples of the application of the *Page v. Smith* rule

4.12 **Schofield v. Chief Constable of West Yorkshire Police (1998) [The Times, May 5th 1998]**

WPC Schofield, a policewoman, suffered post-traumatic shock after her colleague, Sergeant Dodding, unlawfully fired a confiscated gun in her presence. Although Dodding fired into a mattress, the court held that the plaintiff was exposed to the risk of physical injury and so was a primary victim.

She had a psychologically vulnerable personality, but that did not matter as the thin skull rule applied (as in *Page v. Smith*) so she was entitled to damages. (Not much of an advertisement for the police force!)

4.13 **A v. Essex County Council [2004] 1 WLR 1881 (CA)**

Adoptive parents suffered from a psychiatric illness as a result of the trauma of having a violent and destructive young boy placed in their care. The Court of Appeal held that it was not necessary for them to establish that such an illness was in itself a foreseeable consequence of the placement as it was consequent upon a foreseeable threat of physical damage and injury.

"It is difficult to accept that psychiatric illness was a foreseeable result of placing this child with those adopters. But it was foreseeable that William might assault them and damage their property. In these circumstances, the principle in Page v. Smith indicates that there is liability for whatever harm ensues." per Hale LJ at para 71

4.14 **Lambert v. Cardiff CC (Unreported) January 11 2007**

A local authority was held *not* to be liable for the psychiatric injuries caused by a teenager's harassment of her former foster carers, despite the fact that the fostering agreement said that the local authority would insure the carers against such injuries.

v. Stillbirth arising from clinical negligence

4.15 It has recently been held that a where a baby is stillborn as a result of clinical negligence, the mother will be a primary, not a secondary victim. On that basis, she does not need to bring herself into within the *Alcock* criteria.

Zeromska-Smith v. United Lincolnshire Hospitals NHS Trust [2019] EWHC 980 (QB)

The court was required to assess the damages due to the claimant for psychiatric injury following the stillbirth of her daughter in May 2013.

The defendant NHS trust had admitted breach of duty in relation to the stillbirth and accepted that the claimant had consequently suffered from a psychiatric injury or illness. The trial concerned the extent of the damage caused and the quantification of the claim. The damages included £36,000 for pain, suffering and loss of amenity and £6,000 for loss of the satisfaction of bringing her pregnancy to a successful conclusion.

In making this assessment, the court proceeded on the basis that she was a primary victim, not a secondary victim.

"It is appropriate first to consider the appropriate legal category into which the claimant falls for the purposes of her claim to damages. It seems to me that the claimant is a primary victim and not a secondary victim. In this regard, I am assisted by, and endorse, the decision of Mrs. Justice Whipple in YAH v Medway NHS Foundation Trust [2018] EWHC 2964 (QB). In that case, the claimant's daughter sustained brain damage with cerebral palsy as a result of the negligent care when she was born. Whipple J held that the claimant was a primary victim, following the decisions of Dingemans J in Wells v University Hospital Southampton NHS Foundation Trust [2015] EWHC 2376 (QB) and Goss J in RE v Calderdale and Huddersfield NHS Foundation Trust [2017] EWHC 824 (QB).

"The starting point is that the law regards the mother and the foetus as one legal person. Although the baby, if born alive, has its own set of rights derived from the Congenital Disabilities (Civil Liability) Act 1976, those rights do not derogate from the right of the mother to sue as a primary victim. Whipple J had been counsel for the claimant in Wild v Southend University Hospital NHS Foundation Trust [2014] EWHC 4053 (QB) in which Michael Kent QC, sitting as a Deputy High Court Judge, had held that, in a case where, as a result of negligence, the child had died in utero, the mother is a primary victim and has a claim whether or not she has suffered psychiatric illness as a result of the events leading to the stillbirth. That case is on all fours with the present case and, in my judgment, the learned Deputy High Court Judge was correct in his analysis. The result is that it is not necessary for the Claimant to bring herself within the Alcock criteria (Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310) whereby, for a secondary victim to be able to recover, they must suffer shock as defined in that case by Lord Ackner. A primary victim does not have to satisfy the Alcock criteria or control mechanisms, and specifically need not demonstrate that psychiatric illness has been caused by witnessing the sort of shocking event described by Lord Ackner in that case.

"In consequence, if the claimant has suffered injury, including mental injury, as a primary victim it is unnecessary for her to show that what she has suffered amounted at the relevant time to a formal classified psychiatric injury. In particular, although damages cannot be recovered for "normal" bereavement, in my judgment damages can be recovered for "abnormal" bereavement or a pathological grief disorder and it matters not whether this amounts to a formal psychiatric diagnosis within ICD-10 or DSM-5." per Martin Spencer J at paras 96 and 97

vi. Secondary victims and the 'thin skull rule'

4.16 It is not clear now what the position is regarding the thin skull rule and SECONDARY victims.

4.17 According to *Brice v. Brown* [1984] 1 All ER 997 the thin skull rule applies to secondary victims too, provided that it is foreseeable they will suffer SOME nervous shock. However, in *Page v. Smith*, Lord Lloyd identified the plaintiff in *Brice v. Brown* as a PRIMARY victim so it was unnecessary to ask as a separate question whether the defendant should have foreseen injury by shock to a person of normally robust constitution.

5 RESCUERS AS PRIMARY VICTIMS

5.1 The possibility of a rescuer claiming as a *secondary victim* was apparently recognised in *Chadwick v. British Railways Board* [1967] 1 WLR 912. However, in retrospect, such a claimant seems more likely to be classified now as a *primary victim* by active participation. The case was cited with approval by Lord Wilberforce in *McLoughlin v. O'Brian* and by Lord Oliver in *Alcock v. CCSYP* without fully explaining it.

5.2 However, it is clear that Lord Lloyd in *Page v. Smith* was defining primary victims ONLY as persons in fear for their OWN safety.

For example, he says when explaining why the thin skull rule will not cause a proliferation of claims:

"Since liability depends on foreseeability of physical injury, there could be no question of the defendant finding himself liable to the whole world. Before a defendant can be held liable for psychiatric injury suffered by a primary victim, he must at least have foreseen the risk of physical injury." per Lord Lloyd at p.668

5.3 On that basis, Chadwick would not have succeeded as a *primary victim* as there was no evidence that he did fear for his own safety: he suffered shock at seeing the injuries of the people he was rescuing, as a secondary victim might do.

5.4 In *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL), the House of Lords made it clear that a rescuer who does not have a close tie of love and affection with the person he is rescuing cannot succeed as a secondary victim as he is, in effect, a mere bystander.

5.5 However, they extended the definition of a *primary victim* to cover rescuers not only when they feared for their own safety in effecting the rescue, but also when they put themselves in actual physical danger even though they did not perceive it.

5.6 Thus, in retrospect, Chadwick had succeeded as a *primary victim*, not simply because he was a rescuer, but because he had exposed himself to physical danger. Had he not been in any danger, he would apparently have failed both as a *primary victim* and as a *secondary victim*.

5.7 In other words, rescuers are in a very particular category when it comes to making a claim for nervous shock.

- If they enter a dangerous area to effect a rescue and are reasonably scared for their own safety by it, they will be primary victims in the normal sense of *Page v. Smith.*

- If they enter a dangerous area to effect a rescue and are foreseeably shocked at what they see, they may also be designated as *primary victims,* even though they would not have a claim as *secondary victims*, unless they had a close tie of love and affection with the injured parties. Note that it does not matter if they realise the personal danger into which they have put themselves. However, if the rescuer is a professional (such as a paramedic, fire officer or police officer) it may not be foreseeable that they would be shocked by the usual appalling things seen by such people.

- If they effect a rescue which puts them in no personal danger, then they have no greater claim than a mere bystander.

5.8 **White v. Chief Constable of South Yorkshire [1999] 2 AC 455 (HL)**

Members of the police-force claimed compensation for the shock they suffered at the Hillsborough disaster. Their claims failed at first instance on the basis, *inter alia*, that they were persons of "extraordinary phlegm hardened to events which would cause an ordinary person distress."

The Court of Appeal upheld the claims of those who had actually acted as rescuers and suffered shock, though not the claims of those who merely saw the dead and injured after the event. They held that although the police cannot complain against their employer for injuries suffered in the normal course of duty, they can complain if the injury was caused by the antecedent negligence of their employer.

However, the House of Lords overturned the decision, holding that the police had no valid claim at all.

Lord Steyn explained that whilst rescuers are in a special position as regards such defences as *volenti* and contributorily negligence, as far as nervous shock cases are concerned, unless they are 'primary victims' in the sense of being (or reasonably perceiving themselves as being) in actual physical danger, they will be treated as mere bystanders, and so cannot claim for pure nervous shock.

Chadwick v. British Railways Board [1967] 1 WLR 912 was approved, but only on the basis that Chadwick was in fact exposed to personal danger in effecting the rescue, even though it was not that which caused him to suffer the nervous shock.

"In order to recover compensation for pure psychiatric harm as a rescuer it is not necessary to establish that this psychiatric condition was caused by the perception of personal danger… But in order to contain the concept of rescuer in reasonable bounds for the purpose of the recovery of compensation for pure psychiatric harm, the plaintiff must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so. Without such limitations one would have the unedifying spectacle that, while bereaved relatives are not allowed to recover as in the Alcock case, ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster, might recover. For my part the limitation of actual or apprehended dangers is what proximity in this special situation means." per Lord Steyn at p.499

See also *Greatorex v. Greatorex* [2000] 1 WLR 1970

6 ACTIVE PARTICIPANTS AS PRIMARY VICTIMS

6.1 The doctrine expounded in *Dooley v. Cammell Laird & Co Ltd.* [1951] 1 Lloyd's Rep 271, that a person may have a valid claim if he suffers shock as a result of seeing a work colleague being injured, was cited with apparent approval by Lord Oliver in *Alcock* (at 1111), and also by Lord Jauncey (at 1122). It might seem, therefore, that people who witness an accident to a work colleague are to be treated as a special class of *secondary victim* (who usually have to be 'loved ones' of the immediate victim to sustain a claim).

6.2 However, it seems that work colleagues will only have a claim if they are actually involved in the accident **–** albeit involuntarily **–** and so they are actually a special class of *primary victim*.

6.3 In *Alcock*, Lord Jauncey distinguished the case of *Dooley* from one where the workmate was just an observer of an accident: **–**

"Dooley was operating the crane and was therefore intimately involved in, albeit in no way responsible for, the accident. In these circumstances the defendants could readily have foreseen that he would be horrified and shocked by the failure of the rope and the consequent accident, which he had no power to prevent. I do not consider that this case is of assistance where, as here, the plaintiffs were not personally involved in the disaster." per Lord Jauncey at p.1122

cf. *McFarlane v. EE Caledonia* [1994] 2 All ER 1

6.4 There may be a requirement that an active participant should be physically present at the time of the disaster.

Hunter v. British Coal Corporation [1999] QB 140 (CA)

Hunter was driving a flat-bed truck along a roadway in a mine when he struck and damaged a water hydrant, causing it to leak. He attempted to turn off the hydrant, and when he could not, he went in search of a hose to divert the water. Whilst he was away, the hydrant exploded and killed his colleague, Carter. Hunter suffered nervous shock when he heard of the fatality.

HELD: He was not entitled to damages. Although he thought himself to be involved in the death of his colleague (as in *Dooley v. Cammell Laird*), as he was not present at the scene of the accident, he did not have the requisite proximity to make a claim.

6.5 However, this supposed requirement was not applied by the House of Lords in *W v. Essex*, [2001], so either there is no such requirement, or it is subject to exceptions.

W. & Others v. Essex County Council [2001] 2 AC 592 (HL)

Mr. and Mrs. W were approved as specialist adolescent foster carers. They told the council that they were not willing to accept any child who was known or suspected of being a sexual abuser as they had four young children. Despite this, the council placed with them a 15-year-old boy who had been cautioned for indecent assault and was being investigated for rape. This was not told to the parents, though the council and the social worker knew it. The boy sexually abused the children, as a result of which the parents suffered nervous shock. The issue for the House of Lords was whether the parents had a possible cause of action. The defendants argued that even if the parents had suffered psychiatric injury they could not claim as secondary victims as the illness was not brought about by a 'sudden appreciation by sight or sound of a horrifying event'; and they could not claim as primary victims as they were not in the 'range of foreseeable physical injury', there being no danger to themselves of sexual abuse.

Whilst recognising that the parents were likely to have difficulties in establishing their claim, the House of Lords did not rule out the possibility that a court might regard them as primary victims on the basis of precedent, and so permitted the case to proceed to trial.

"Is it clear beyond reasonable doubt that the parents cannot satisfy the necessary criteria as 'primary' or 'secondary' victims? As to being primary victims it is beyond doubt that they were not physically injured by the abuse and on the present allegations it does not seem reasonably foreseeable that there was a risk of sexual abuse of the parents. But the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations...

"I do not consider that any of the cases to which your Lordships have been referred conclusively shows that, if the psychiatric injury suffered by the parents flows from a feeling that they brought the abuser and the abused together or that they have a feeling of responsibility that they did not detect earlier what was happening, prevents them from being primary victims. Indeed, in Alcock, Lord Oliver said: "The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable. I stress to the parents that I am not giving any indication either way as to the outcome of the case but, win or lose, if they wish to pursue that claim they should not be barred from doing so." per Lord Slynn at p.600/601

6.6 Although the co-worker/active participant must be a 'participant' in the accident, he does not need to suppose himself to be the cause of it, although he might incidentally do so. This can be quite a fine line, but essentially means that he must reasonably feel that the accident had something to do with him, but not that he was to blame.

Salter v. UB Frozen and Chilled Foods Ltd. [2003] SLT 1011

Maurice Salter, a forklift truck operator, was driving a truck at the defender's factory on which a colleague, Palmer, was being carried to stock-take. Palmer was checking goods stored on a row of pallets piled up high, close to the roof beams of the factory building. From time to time he had to duck to avoid contact with the roof beams. At this level Salter could not see the stock-taker, who gave shouted instructions to him. At one point, the forklift truck shuddered to a halt and an orange helmet fell to the ground. Salter lowered the cage, and saw blood dripping from it. He then saw Palmer bleeding from his ears, nose and mouth, fatally wounded. He had struck his head against a beam when the forklift truck had moved forward. Salter became hysterical. He blamed himself for the accident and suffered from PTSD. HELD: He was a primary victim and was entitled to damages. This was not because he thought himself to blame, but because he had been an active participant.

"Some care must be taken when using the phrase involuntary cause and participant because they may not be the same. Involuntary cause connotes feelings of responsibility or guilt, which may lead to psychiatric injury. This raises an issue of causation rather than the existence and scope of a duty of care. In Dooley, the accident, in which no-one suffered physical injury, was caused by the faulty rope or the overloading of the sling, neither of which was the plaintiff's responsibility. He was not the involuntary cause of the accident but was most certainly an active participant and the instrument of any injury that might have ensued. This was held to be enough to establish the duty not to cause psychiatric injury." per Judge Gordon Reid Q.C. at para 21

7 SECONDARY VICTIMS: Introduction

7.1 A secondary victim is someone who suffers a nervous shock as a result of witnessing an injury to a loved one in an accident. The loved one is called the 'immediate victim', though also often – and confusingly – called a 'primary victim'.

7.2 There is clearly some judicial confusion about the distinction between primary and secondary victims.

Farrell v. Avon HA [2001] Lloyd's Rep. Med 458

Farrell was phoned by his ex-partner to tell him that she had just given birth to his son. He went to the hospital, where he was told by a member of staff that the boy had died, and he was given a dead baby to hold. However, it turned out that his baby had not died, and the corpse belonged to someone else (obviously!).

He suffered PTSD and was awarded damages on the basis of being a *primary victim*.

7.3 Because of the possibility that a single act of negligence might produce a sight which would cause foreseeable nervous shock to a great many people (e.g. a celebrity being accidentally killed during a live streaming of a pop concert) the courts have adopted certain 'control mechanisms' to limit the possible number of claimants. In essence, a duty of care is only owed to the loved ones of the immediate victim who actually saw the event themselves and suffered an immediate shock because of what they witnessed.

8 SECONDARY VICTIMS: *Alcock v. CCSYP*

8.1 The leading case on the duty of care owed to secondary victims is *Alcock and Others v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

8.2 Taking its lead from Lord Wilberforce's speech in *McLoughlin v. O'Brian* (1983), the House of Lords in *Alcock v. Chief Constable of South Yorkshire Police* (1992), repeated, expanded and illustrated the three 'control mechanisms' designed to limit sustainable cases of nervous shock caused by witnessing an accident.

Alcock v. Chief Constable of South Yorkshire Police [1992] 1 AC 310 (HL)

On April 15th 1989, the defendant was responsible for the policing of the FA Cup semi-final football match between Liverpool and Nottingham Forest at the Hillsborough Stadium in Sheffield. The sell-out match was being televised live, but after six minutes it was halted as the police permitted the excess crowd to pour into the wire spectator pens, crushing those at the front. 96 people died and more than 400 sustained crushing injuries. As the disaster became apparent, live pictures of the events at the stadium were broadcast on television. The plaintiffs all suffered nervous shock as a result of witnessing the events.

The House of Lords considered to which, if any of the victims, the defendant in the circumstances owed a duty of care. The situations of the plaintiffs (all of whom failed in their actions) were as follows:

Robert Alcock: He was at the stadium. He witnessed the scenes from the West Stand. He knew his brother-in-law was at the match, but thought he was in the stands rather than in the terraces. He found him dead at the mortuary at midnight.

Mr. & Mrs. Copoc: They saw the scenes on live television, and were told at 6.00 a.m. that their son was dead.

Brian Harrison: They were at the ground where his two brothers were killed.

Brenda Hennessey: She saw the scene on television, though she did not realise at first that her brother was in the stands. Told at 6 p.m. that he was dead.

Denise Hough: She saw the scene on television. She knew her much younger brother (who she used to foster) was behind the goal. Learnt he was dead at 4.40 a.m. Identified the body two days later.

Catherine Jones: She lost her brother. She knew he was at the match and likely to be behind the goal. She heard on the radio that the death toll was mounting. She watched a recorded television report at 10.00 p.m. in the hope of seeing him alive. At 5 a.m. she was told he was dead.

Stephen Jones: He saw bodies on television. He did not know his brother was dead until 2.45 a.m.

Joseph Kehoe: He lost his 14-year-old grandson. He did not know he was at the match until after the event. At 3 a.m. he was told that both the boy and his father (Kehoe's son-in-law) were dead.

Alexandra Penk: She lost her fiancé, Carl Rimmer, who she had known for four years. She saw the events live on television and continued watching in the hope of seeing him, but did not do so. She was told at 11.00 p.m. that he was dead.

Lord Oliver identified five issues that must be addressed in deciding when a duty of care is owe to a secondary victim before concluding that none of the plaintiffs in the action could meet them all.

"The common features of all the reported cases of this type decided in this country prior to the decision of Hidden J. in the instant case and in which the plaintiff succeeded in establishing liability are, first, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim." per Lord Oliver at p.411

9 SECONDARY VICTIMS: The Control Mechanisms

9.1 The five criteria listed in *Alcock v. CCSYP* are usually concentrated down to three so-called 'control mechanisims', reflecting the speech of Lord Wilberforce in *McLoughlin v. O'Brian.*

i. The secondary victim must be a 'loved one' of the immediate victim

ii. The secondary victim must be proximate (i.e. usually close in time and space) to the accident

iii. The shock must have been caused by a sudden horror at the event, not by a gradual realization of the horror.

9.2 In addition to these three special criteria, remember that the shock suffered must also (i) be a recognized psychiatric illness; and (ii) must be the foreseeable consequence of the breach of duty by the defendant.

10 SECONDARY VICTIMS: The First Control Mechanism

i. The secondary victim must be a 'loved one' of the immediate victim

10.1 The House of Lords reconsidered Lord Wilberforce's categorisation in *McLoughlin v. O'Brian* (1983**)**, and said that an action depended on reasonable foreseeability, and so was open to anyone who could display 'close ties of love and affection', whatever their actual relationship with the accident victim.

10.2 A close tie of love and affection is **presumed** between spouses, and between parents and children. Others (including siblings) have to prove such a tie, but it is **open to anyone** to attempt to do so.

"As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationships which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance, when the loved one suffers a catastrophe.

"They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than of persons who have been married to each other for many years... The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases." per Lord Keith at p.397

- Of the plaintiffs, Mr. and Mrs. Copoc, whose son was killed, were within the class (though they failed on other grounds), as was Alexandra Penk, who lost her fiancé.

- Brian Harrison lost two brothers, but the court held that a normal brotherly relationship did not give rise to a close and intimate relationship giving rise to a special bond of affection. As Harrison had not attempted to prove his case was otherwise, his claim failed.

- Mr. Alcock's relationship with his brother-in-law, in default of very special facts, was also held not to make him reasonably foreseeable as a potential sufferer from nervous shock.

ii. Mere bystanders

10.3 Although there was some suggestion in *Alcock v. CCSYP* that bystanders who witness unusually horrific accidents may have a claim, this is not borne out by later cases, and may be presumed not to represent current law. If the claimant is not a loved one, he can only succeed if he was somehow a primary victim.

10.4 **Rapley v. P&O European Ferries (Dover) Ltd. (1991) (CA)**

A plaintiff who voluntarily identified victims of the Zeebrugge ferry disaster three days later was not classified as a rescuer and his claim failed.

10.5 However, in *Alcock v. CCSYP*, the House of Lords said they would be prepared to accept the claim of a bystander if the circumstances were such that a reasonably strong-nerved person would have been shocked.

"The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific." per Lord Keith at p.397

10.6 Lord Ackner gave the following example:

"In the course of argument your Lordships were given, by way of an example, that of a petrol tanker careering out of control into a school in session and bursting into flames. I would not be prepared to rule out a potential claim by a passerby so shocked by the scene as to suffer psychiatric illness."
per Lord Ackner at p.403

10.7 However, this *obiter* was not accepted in the judgments relating to the Piper Alpha disaster, where witnesses to the worst ever oil-rig fire (killing 164 men) were unsuccessful in their claims for the nervous shock they suffered seeing their work colleagues and friends perish in the fire.

10.8 **McFarlane v. EE Caledonia [1994] 2 All ER 1 (CA)**

The plaintiff was a painter on the Piper Alpha rig. At the time of the explosion he was on a support vessel some 550 metres away, although he came within 100 metres of the fire when the vessel moved towards the rig to attempt to assist.

The Court of Appeal held that for the purposes of recovering damages for nervous shock caused by fear of physical injury to himself in a horrific event, a person was a participant in the event if (i) he was in the actual area of danger created by the event, even though he escaped physical injury by good fortune, or (ii) although not actually in danger he reasonably thought he was because of the sudden and unexpected nature of the event, or (iii) although not actually within the area of danger he came into it later as a rescuer.

However, a person who was a mere bystander to horrific events could not recover damages for psychiatric illness resulting from the experience unless there was a sufficient degree of proximity, which required both nearness in time and place and a close relationship of love and affection between plaintiff and victim. As none of these applied to the plaintiff, he was unsuccessful.

Stuart-Smith LJ considered such horrific events as those contemplated by Lord Ackner, but concluded: *"In my judgment, both as a matter of principle and policy, the court should not extend the duty to those who are mere bystanders or witnesses of horrific events unless there is a sufficient degree of proximity, which requires both nearness in time and place and a close relationship of love and affection between plaintiff and victim."* per Stuart-Smith LJ at p.14

10.9 **Hegarty v. E.E. Caledonia Ltd. [1996] 1 Lloyd's Rep 413**

The court reached the same conclusion as in *McFarlane v. EE Caledonia* [1994] in this similar case. The High Court ruled on February 5th 1997 that William Hegarty, 44, who had been asleep on the support ship Tharos, was not a primary victim of the oil rig explosion, despite his praying for his life as a huge fireball hurtled towards him. He suffers from psychiatric illness, has not worked since the explosion, and is now scared of the sea and heights.

iii. Mere bystanders claiming to be primary victims

10.10 Mere bystanders cannot get round the requirement of a close tie of love and affection simply by claiming to by primary victims instead! Although this seems to go without saying, there has been a recent case in Scotland where it was (unsuccessfully) tried.

10.11 **Weddle v. Glasgow City Council [2019] SLT (Sheriff's Court) 206**

Danielle Weddle, a student at Stirling University, witnessed the aftermath of a serious road traffic accident involving *inter alia* several pedestrians being struck by a bin lorry, causing her to suffer nervous shock.

She had not witnessed the beginning of the incident, only becoming aware of the lorry after it collided with vehicles. She initially thought she had witnessed a road traffic accident in which no one had been harmed, and she showed no physical reaction. She crossed the road and unintentionally walked in the direction from which the lorry had come. She thereafter began to witness the aftermath.

As she realised what she was witnessing (including several dead girls with horrific injuries), she became increasingly distressed. Thereafter she suffered intrusive thoughts, flashbacks, anxiety and depression. She was referred to counselling and diagnosed with post-traumatic stress disorder (PTSD). She underwent counselling and cognitive behavioural therapy. She was unable to attend university and her studies were disrupted for five years. By January 2019, she continued to meet diagnostic criteria for PTSD and to be prescribed medication for sleeping difficulties and anxiety.

She claimed that she was a primary victim because, as the events unfolded before her, she reasonably believed she was exposed to the danger of physical injury and was in fear for her own safety, such that she fell within the range of foreseeable physical injury and was owed a duty of care by the defender.

However, the evidence, which included CCTV, made it clear that she was never actually at risk of physical injury; and nor could she reasonably believe she was at risk of physical injury. She had thus not proved that at the relevant time, the lorry driver ought to have had her in contemplation as somebody who was at risk of injury: thus, no duty of care was owed to her by him in the circumstances. She was not a primary victim and, as she had no close tie of love and affection to the immediate victims, she had no claim as a secondary victim either.

See also *Fagan v. Goodman (*2001), below at para 20.1.

iv. Same Sex Couples

10.12 Since December 5th 2005, same sex couples (and now all couples) have officially been able to enter into marriage-like partnerships under the Civil Partnership Act 2004. The Act clearly regards the status of such partners as akin to a marriage (even imposing the same restrictions regarding age, bigamy and incest), so one might suppose that such a couple would now be regarded as spouses for the purposes of nervous shock as well.

10.13 Under the Marriage (Same Sex Couples) Act 2013, marriage of same sex couples became lawful. Couples married under these provisions will surely be treated as spouses for the purposes of the common law rules on nervous shock.

11 SECONDARY VICTIMS: The Second Control Mechanism

i. The secondary victim must be proximate to the accident

11.1 The claimant must be close to the accident in both time and space, but it may be enough that he came upon the victims shortly after the accident.

McLoughlin v. O'Brian [1983] 1 AC 410 (HL)

"The shock must come through sight or hearing of the event or its immediate aftermath. Whether some equivalent of sight or hearing e.g. through simultaneous television, would suffice may have to be considered." per Lord Wilberforce at p.422

ii. Close in time

11.2 **Alcock and Others v. Chief Constable of South Yorkshire [1992] 1 AC 310 (HL)**

"It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath." per Lord Ackner at p.404

11.3 In *McLoughlin v. O'Brian* a two-hour gap was described by Lord Wilberforce as being on the margin of what the process of logical progression from case to case would allow. On that basis, the claim of Mr. Alcock who saw his brother-in-law in the mortuary eight hours after the accident was not allowed.

11.4 However, recent cases have been more generous to the claimant in this respect, allowing claims even when the first sight of the dead relative was in the mortuary after they had been cleaned up.

11.5 **Galli-Atkinson v. Seghal [2003] Lloyd's Rep. Med. 285 (CA)**

At 7.05 pm on January 12th 1998, Livia, the 16-year old daughter of Giulietta Galli-Atkinson, was killed on her way to a ballet class when Sudhaker Seghal's car mounted the pavement and struck her. She was expected home from her class at 7.45, and by 8.05, her father decided to go to the school and pick her up. A police cordon that had been set up around the accident scene diverted him.

When he got to the school and found that Livia was not there, he phoned his wife who said she was coming down herself. The father then discovered the death from one of the police officers and attempted to phone his wife again but she had already left. When she arrived at the cordon, she was told by a police officer that her daughter was dead. She screamed hysterically and collapsed to the ground, completely beside herself.

At 9.15 pm the father identified Livia in the mortuary. When he came out and confirmed the news to his wife, she fell to her knees, sobbing uncontrollably, and crawled into the mortuary to see Livia, who face and head had been disfigured by the accident. She was subsequently diagnosed as suffering from a psychiatric illness brought on by these events. She sued the driver, but the Recorder held that on the basis of *McLoughlin v. O'Brian* and *Alcock*, she could not succeed because the shock that caused the psychiatric disorder was not occasioned by her seeing the accident or its aftermath. He was not prepared to accept that the incident in the mortuary was part of the aftermath, and held that, in any case, her shock had been caused by what the police had told her, not by witnessing the event.

The Court of Appeal allowed the mother's appeal. Her condition was not just caused by being told of the death but also by seeing her daughter at the mortuary, and although the mortuary visit was sometime after the death, it was simply the last of an interrupted sequence of events.

"In the present case, the immediate aftermath, in my view, extended from the moment of the accident until the moment that the appellant left the mortuary. The judge artificially separated out the mortuary visit from what was an uninterrupted sequence of events, quite unlike the visit to the mortuary in question in Alcock. The visit with which we are concerned was not merely to identify the body. It was to complete the story so far as the appellant was concerned, who clearly at that stage did not want – and one can understand this – to believe that her child was dead.

"Accordingly, in my judgment, the judge was wrong to have excluded what happened at the mortuary from consideration. If, therefore, it could properly be said, on the basis of the psychiatric evidence, that the whole of that sequence of events which was witnessed by the appellant played a part in producing the illness from which she undoubtedly suffered, then the appellant is entitled to succeed in her claim." per Latham LJ at paras 26 and 27

iii. Close in space

11.6 The victim must be an actual witness, present at the event or its aftermath. It is not enough merely to be told of an horrific event or injury to a loved one.

Coffey v. Jaensch (1984) 33 SARS 255 (Supreme Court of Australia)

Coffey, a police motor-cyclist, collided with a car negligently driven by Jaensch. As a result of seeing her husband badly injured and in a critical condition at the hospital, Coffey's wife suffered from a psychiatric illness, including a delusion that the car driver had deliberately collided with her husband and continued to attack him after the accident. It was held that she was entitled to damages for the shock caused by what she saw and heard at the hospital.

"I understand 'shock' in this context to mean the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognisable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential."

per Brennan J. in the High Court (1984) 155 CLR 549 at p.567

iv. Live TV transmissions

11.7. It may not always be necessary for the claimant to have seen the victim first hand. It may be enough to have seen a simultaneous television broadcast of a particularly horrific event. However, there has been no case of this decided in the claimant's favour.

11.8 **Alcock and Others v. Chief Constable of South Yorkshire [1992] 1 AC 310 (HL)**

"Although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneous television broadcasts of what occurred cannot be equated with the 'sight or hearing of the event or its immediate aftermath.' Accordingly, shocks sustained by reason of these broadcasts cannot found a claim. I agree, however, with Nolan LJ that simultaneous broadcasts of a disaster cannot in all cases be ruled out as providing the equivalent of the actual sight or hearing of the event or its immediate aftermath. Nolan gave an example of a situation where it was reasonable to anticipate that the television cameras, whilst filming and transmitting pictures of a special event of children travelling in a balloon, in which there was media interest, particularly amongst the parents, showed the balloon suddenly bursting into flames."

per Lord Ackner at p.405

11.9 n.b. The television authorities have a code of ethics not to show pictures of suffering by recognisable individuals. If they do, this could amount to a *novus actus interveniens*.

12 SECONDARY VICTIMS: The Third Control Mechanism

i. The shock must have been caused by sudden horror at the event

12.1 The nervous shock must be caused by a sudden horror at the event, rather than a gradual appreciation of it. (The actual illness may develop gradually, but it must have been sparked off in an instant. This could be a rather fine distinction!) This was discussed in some detail in *Alcock*.

12.2 **Alcock and Others v. Chief Constable of South Yorkshire [1992] 1 AC 310 (HL)**

Lord Ackner at p.401

""Shock," in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system."

Lord Ackner at p.400

"Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as by the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages. Brennan J. in Jaensch v. Coffey, 155 C.L.R. 549 , 569, gave as examples, the spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result, but who, nevertheless, goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result also has no claim against the tortfeasor liable to the child."

Lord Oliver at p.416

"Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. It would be inaccurate and hurtful to suggest that grief is made any the less real or deprivation more tolerable by a more gradual realisation, but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point. In my opinion, the necessary proximity cannot be said to exist where the elements of immediacy, closeness of time and space, and direct visual or aural perception are absent."

Lord Oliver at p.417

"In each case other than those of Brian Harrison and Robert Alcock, who were present at the ground, the plaintiff learned of the death of the victim at second-hand and many hours later. As I read the evidence, the shock in each case arose not from the original impact of the transmitted image, which did not, as has been pointed out, depict the suffering of recognisable individuals. These images provided no doubt the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence has occurred, finally confirmed by news of the death and, in some cases, subsequent identification of the victim. The trauma is created in part by such confirmation and in part by the linking in the mind of the plaintiff of that confirmation to the previously absorbed image.

"To extend the notion of proximity in cases of immediately created nervous shock to this more elongated and, to some extent, retrospective process may seem a logical analogical development. But, as I shall endeavour to show, the law in this area is not wholly logical and whilst having every sympathy with the plaintiffs, whose suffering is not in doubt and is not to be underrated. I cannot for my part see any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability."

ii. Claims which failed because the shock was not a sudden reaction to the negligent act

12.3 **Palmer v. Tees Health Authority [1991] Lloyd's Rep Med 351 (CA)**

Between March 1992 and May 1994, Armstrong was under the care of the defendant's hospital. Armstrong had a history of childhood sexual abuse and was diagnosed as suffering from a psychopathic personality. He told hospital staff that he had sexual feelings towards children and that if he were discharged, he would murder a child. He was discharged and on June 3th 1994, the claimant's four-year-old daughter Rosie went missing. On July 3rd 1994, Rosie's body was found in Armstrong's house, where she had been sexually abused and murdered. On July 6th, the claimant identified her daughter's body. She claimed, *inter alia*, for the nervous shock that was brought on by these events.

HELD: She could not claim as a secondary victim. Although she had experienced imagined fears of her daughter's abduction upon her disappearance, this was not the same as the sudden sight or sound of a horrifying event.

12.4 **Sion v. Hampstead Health Authority [1994] 5 Med LR 170 (CA)**

A young man was injured in a motor-cycle accident. For fourteen days his father stayed at his bedside, watching him deteriorate in health, go into a coma and die. The father suffered nervous shock but his claim for damages was dismissed, as it had not been caused by a sudden appreciation of a horrifying event. Indeed, by the time his son died, the death was expected.

"A psychiatric illness caused not by a sudden shock but by an accumulation of more gradual assaults on the nervous system over a period of time is not enough." per Peter Gibson LJ

12.5 **Taylor v. A Novo (UK) Ltd. [2013] EWCA Civ 194**

On 27 February 2008, Cindy Taylor was injured in an accident at work as a result of which she sustained injuries to her head and left foot. She was injured when a fellow employee caused a stack of racking boards to tip over on top of her. The accident was caused by the admitted negligence of the appellant her employer (Novo). She was apparently making a good recovery when on 19 March 2008 she suddenly and unexpectedly collapsed and died at home. Her sudden collapse and death were due to deep vein thrombosis and consequent pulmonary emboli, which themselves were due to the injuries that she had sustained in the accident. Her daughter, Crystal Taylor, did not witness the accident, but she did witness her mother's death as a result of which she suffered significant post-traumatic stress disorder.

The judge held that Crystal was entitled to damages as a secondary victim on the basis (*inter alia*) that she was present at her mother's sudden death (which was the fault of the defendants) and which caused the daughter a foreseeable shock.

However, the Court of Appeal held that this did not meet the Alcock criteria, which required the secondary victim to be present at the **original accident**, not the eventual death. The relevant 'event' for the application of the criteria was the tipping of the stacking boards over the mother, at which the daughter was not present.

The case was distinguishable from *North Glamorgan NHS Trust v. Walters* and *Galli-Atkinson v. Seghal*, as in those cases the court held there to be one unbroken chain of events, which could not be argued here,

"First, it seems to me that, if the judge is right, Ms. Taylor would have been able to recover damages for psychiatric illness even if her mother's death had occurred months, and possibly years, after the accident (subject, of course, to proving causation). This suggests that the concept of proximity to a secondary victim cannot reasonably be stretched this far. Let us now consider the situation that would have arisen if Mrs. Taylor died at the time of the accident and Ms. Taylor did not witness the death, but she suffered shock when she came on the scene shortly after the "immediate aftermath". In that event, Ms. Taylor would not have been able to recover damages for psychiatric illness because she (possibly only just) would have failed to satisfy the physical proximity control mechanism.

"The idea that Ms. Taylor could recover in the first situation but not in the others would strike the ordinary reasonable person as unreasonable and indeed incomprehensible. In this area of the law, the perception of the ordinary reasonable person matters. That is because where the boundaries of proximity are drawn in this difficult area should, so far as possible, reflect what the ordinary reasonable person would regard as acceptable." per Lord Dyson M.R. at para 30

12.6 **Wild v. Southend University Hosptal NHS Trust [2014] EWHC 4053 (QB)**

Ian Wild's wife, Lisa, suffered a stillbirth due to the admitted negligence of the defendant hospital. Due to the circumstances of the birth, Ian suffered from a psychiatric illness. Lisa had been admitted to hospital expecting to deliver a baby, but midwives were unable to find its heartbeat. When other medical professionals assessed Lisa and the foetus, it became apparent to Ian that something was wrong. A fifth person arrived with a scanner, assessed Lisa and said "I concur", which deeply distressed Ian, who thereby learned that the foetus had died. Ian and Lisa were told that the baby would have to be delivered the following day. Both parents suffered nervous shock.

The trust admitted that its negligence had led to the stillbirth and that it was liable to Lisa for nervous shock **–** as a primary victim **–** but denied any liability to Ian as a secondary victim.

HELD: Ian had failed to meet the requirements of the control mechanisms for secondary victims. His experience did not equate to actually witnessing horrific events leading to a death or serious injury. His case was materially different from *Walters,* being based on an "event" which started with the realisation that the baby had already died.

"In my judgment this case is materially different from the facts in Walters being based on an "event" which starts with the realisation that Matthew has already died. The authorities have driven me to conclude with reluctance that Mr. Wild cannot on the facts succeed in his claim for damages which must therefore be dismissed. It would be difficult to argue that that is a logical outcome but, as Lord Oliver said in Alcock at page 417 in relation to the submission that a visit to the mortuary several hours after the tragedy should be treated as part of the immediate aftermath: "To extend the notion of proximity in cases of immediately created nervous shock to this more elongated and, to some extent, retrospective process may seem a logical analogical development. But … the law in this area is not wholly logical." *The same may be said about an extension to a clinical negligence case where the first possible manifestation of the consequences is when medical staff discover that the baby has already died in the womb."* per Michael Kent QC at para 53

12.7 **Shorter v. Surrey and Sussex NHS Trust [2015] EWHC 614 (QB)**

Julie Shorter claimed damages for nervous shock following the death of her sister, Lucia Sharma, as a result of the admitted negligence of the defendant NHS Trust. Lucia had collapsed with a severe headache and had been admitted to hospital. A CT scan was performed and she was told that she had not suffered a subarachnoid haemorrhage. She was discharged after two days. Seven days later she was readmitted with head and neck pain and a review of the CT scan showed that she had suffered a haemorrhage a week earlier. Lucia's husband telephoned the claimant to inform her that there had been an undetected haemorrhage, and that her sister's condition had worsened.

The claimant was a senior sister in a neuro-intensive care unit and was aware of the seriousness of her sister's condition and the possibility of a further haemorrhage. She attended the hospital accident and emergency department and claimed that she saw her sister rolling around on a trolley, crying with pain, clutching her head and saying that she was in agony. The claimant returned home some hours later. She received a call from her sister's husband informing her that her sister had suffered a seizure, and then later another call to say that she had started fitting. She attended the hospital and saw her sister on life support and was told by the sister's husband that she had "gone". The sister died shortly afterwards.

The claimant suffered from a major depressive disorder and sought damages from the Trust. The Trust admitted that the sister would probably have survived if it had not negligently failed to diagnose a haemorrhage, and accepted that the unusually close relationship between the claimant and her sister (quasi mother and daughter) was such as to bring her within the class of persons eligible to bring a claim as a secondary victim. The claimant argued that she had been exposed to a seamless single horrendous event which she had directly witnessed and/or in which she had directly and immediately been involved, either by direct sight or by sound. The Trust argued that the claimant did not have the required degree of proximity to a specific and shocking event because the realisation of the danger to her sister had been gradual.

HELD: The claimant had failed to show that her psychiatric illness had been caused by the sight or sound causing an assault on her senses. She had not established sufficient proximity to the event by a sudden and direct visual impression on her mind of witnessing the event or its aftermath. There had been no physical proximity when the claimant had been informed by telephone of the Trust's negligence. After the claimant left the hospital, all the information she gained over the following nine hours had been by telephone, she had not seen her sister and had not been proximate to the unfolding events. It was not until she saw her sister on life support that the reality had become clear, but it was not a sudden or unexpected shock.

There had not been a seamless single horrifying event; there had been a series of events over a period of time. The claimant had been proximate to some of those events, but most of her fear, panic and anxiety had been caused by information communicated to her by telephone, or face-to-face by her sister's husband when he told her that her sister had gone. None of the individual events within the series actually witnessed by the claimant had given rise to the sudden and direct appreciation of a horrifying event. Even when she had witnessed her sister on the life support machine, her perception had been informed by the information she had been receiving over the previous 15 hours and by her own professional knowledge

"No one can fail to have the deepest sympathy for what the Claimant suffered during the period from Mr. Sharma's telephone call on the morning of 12 May until – and indeed after – Mrs. Sharma's death. However, in order to succeed in her claim for damages, she has to overcome the high bar of the "control mechanisms" which apply to cases such as hers. I have come to the conclusion that she cannot do so. It does not seem to me that what happened in this case can properly be described as a "seamless single horrifying event". There was a series of events over a period of time. The Claimant was proximate to some of those events, during the periods spent in ESH and SGH. However, much of her fear, panic and anxiety were caused by information communicated to her by telephone, or face-to-face by Mr. Sharma, when he told her that her sister had "gone".

"I do not consider that any of the individual events within the series actually witnessed by the Claimant gave rise to the sudden and direct appreciation of a "horrifying event". Even when she witnessed her sister on the life support machine, her perception was informed by the information she had been receiving over the previous 15 hours or so and by her own professional knowledge. Mrs. Sharma did not have the type of injuries suffered by the deceased in Galli-Atkinson, was not in obvious pain and had not been pronounced dead at that time. In the circumstances, it does not appear to me that the sight of her can be regarded as a "horrifying event"; nor was it sudden or unexpected. In my view, there was a series of different events on 12/13 May that gave rise to an accumulation during that period of gradual assaults on the Claimant's mind and resulted in her psychiatric illness."

per Swift J. at para 218

12.8 **Paul v. The Royal Wolverhampton NHS Trust [2019] EWHC 2893 (QB) (4.11.2019)**

Parminder Singh Paul had Type II diabetes and, with this, a number of complications. In 2010 he suffered a transient ischaemic cerebral attack. In 2012 he was noted to have high blood pressure and he developed chronic kidney disease. In November 2012 he was admitted to New Cross Hospital in Wolverhampton as an emergency complaining of chest and jaw pain. He was given treatment for acute coronary syndrome, but no cardiac investigations were performed apart from echocardiography.

In June 2013 Mr Paul was placed on dialysis. On 3 August 2013 he was admitted to New Cross Hospital with a two to three-week history of breathlessness. Haemodialysis was commenced on 6 August 2013.

On 30 September 2013 Mr Paul was seen by Dr Nicholas, Consultant Nephrologist, who noted he was established on haemodialysis and felt better. Renal transplantation was discussed. Dr Nicholas noted "his ECG does show significant abnormalities, which would be of great concern to the Transplant Surgeons". Mr Paul was referred to Dr Horton, Consultant Cardiologist. He was seen on 9 January 2014 and an elective coronary angiography was recommended. Mr Paul died less than three weeks later when he collapsed in the street when on a shopping trip with his two daughters, aged 9 and 12.

The events are described in the judgment of Master Cook.

a) Sadly for nine-year-old Mya she had had a minor argument with her father shortly before he died, so she was walking slightly in front of him. Saffron was walking slightly behind.
b) Mr Paul said he felt ill.
c) Mya turned and saw her father lean against the wall momentarily and then his eyes roll back.
d) Both girls saw him fall backwards and his head hit the floor.
e) The girls were alone with their father who was unconscious or dead in the street. They were so distressed and frightened they had difficulty calling for help.
f) Eventually a woman responded to their shouts and called an ambulance.
g) The girls contacted their mother. They were so distressed that Mya managed to call her mother but could not be understood. 12-year-old Saffron broke the news to her mother that her father had collapsed.
h) Both girls saw a man holding their father's head as he lay on the floor and there was blood on the man's hands from the injury sustained when Mr Paul's head hit the ground.
i) The girls were taken into a nearby church for a short time because of what they had been witnessing. Whilst they were there their mother arrived and they heard her screams, screaming their father's name.
j) The girls went back outside and saw their father under a foil blanket receiving chest compressions from paramedics. There was a crowd of people there including the police. They were then taken away to a relative's house.
k) The timings are: the ambulance arrived at 15.57 and left the scene 30 minutes later at 16.28. Mr Paul arrived at hospital at 16.43 but further resuscitation was felt to be futile and he was declared dead at 16.51.
l) The children therefore witnessed their father's final event.

It was the daughters' case that there were failures in the care given to Mr Paul when he was seen at New Cross Hospital for cardiac symptoms in November 2012. Inpatient coronary angiography should have been arranged during this emergency admission. Had this occurred it would almost certainly have demonstrated significant coronary artery disease. It is likely he would have been offered coronary revascularisation. Had coronary revascularisation been performed in 2012 it is unlikely the fatal event in January 2014 would have occurred.

On that basis, the claimants' case was that Mr Paul's collapse was the first appreciable manifestation of the defendant's breach of duty (in other words the point at which the damage became evident).

However, the claim was struck out. It was bound to fail because there was no close proximity in space and time between the daughters witnessing their father's death and the defendant's alleged breach of duty 14 months earlier, which had to be established before a secondary victim claim could succeed.

iii. Treating a series of events as a single event: exceptional cases

12.9 In some cases, the courts seem to have relaxed this rule, to treat a series of events as a single, sudden event. Considering the large number of recent cases in which these decisions have been distinguished, they are clearly exceptional.

12.10 **North Glamorgan NHS Trust v. Walters [2003] PIQR P16 (CA)**

Ceri Walter's ten-month-old son, Elliot, was suffering from acute hepatitis and probably could have been successfully treated with a liver transplant. However, he was negligently misdiagnosed so that he was not so correctly treated and his parents were told his condition was not serious. He then suffered a major epileptic seizure leading to a coma, irreparable brain damage and death. He had suffered the seizure in the presence of his mother at about 3 am on July 30th 1996 and following a series of harrowing events he died in her arms at about 4.30 pm the next day.

Ceri suffered from pathological grief as a result of all this, but the hospital claimed that she could not recover damages because there had not been a single, sudden event which had caused it: rather there had been a series of small events spread over 36 hours. It was held that the 36 terrible hours from her son's fit to his death could be regarded as a single event for these purposes, and that the hospital was liable.

See also *Galli-Atkinson v. Seghal* [2003] Lloyd's Rep. Med. 285 (CA)

12.11 **Werb v. Solent Trust [2017] (Unreported)**

A father who saw the mangled body of his 15-year-old son after he had walked infront of a train, was held to have an answerable case against the psychiatric hospital that had negligently let the troubled youth out, even though the father did not realise it was his son who had been killed until 25 minutes later.

George Werb was a psychiatric inpatient at The Priory Hospital, Southampton. He died on 28th June 2013 at the age of 15, after he was permitted to go home on leave on 27th June 2013, even though he had reported feeling 'very suicidal' to the hospital staff and had been started on fluoxetine on the day of his release, which increases the risk of suicidal behaviour.

On the morning of 28 June, George's father, Justin, was driving past a disused railway station, when he saw two or three police cars parked and wondered what was happening. He carried on a few hundred yards further down the road to his home and parked his car. As he was getting out of the car, two of his tenants, Craig and Peter, pulled up next to him and told him that someone had jumped off of the railway bridge at the end of the road, as they had just driven over it. On hearing this and the bridge being only just a hundred yards or so away, he decided to walk and have a look at what had happened.

As he approached the bridge, he saw what were human like remains splattered down mainly the inside of the track: grey matter with the twisted remains of a human body, bone fragments and blue jeans and other items of clothing.

He walked away back to his home, disturbed at what he had seen. About 25 minutes later, he got a phone call from his ex-wife, Joanne, screeching that "George was gone!"

In his own words: "I could tell immediately that she was sounding very desperate and then, at that moment what came over me I can only describe as a sensation of being a massive combination of pure white shock and being immediately covered by a blanket feeling of cold ice as I realised that it could be George who I had just seen on the line minutes earlier. Joanne said something about her partner, Eddie, and the train station, and then all I remember is struggling to get dressed as quickly as I could, my hands were shaking seemingly uncontrollably, my legs were like jelly and I ran to the top of my stairs, literally throwing myself down them and heading off up the road to make sure that it wasn't George, though I now knew it was. George would wear blue jeans like the ones I had seen and it was clear to me that this must have been George. Though nothing had been confirmed to me, as a father I knew that what I had seen was my son. As I quickly approached the bridge, I saw Eddie's truck and I ran to briefly look over the parapet again. By now there were other police cars present as well. I was in shock and running on adrenalin but when I looked over the bridge again the body had been moved but there were still blood and guts everywhere which I knew must be George's."

Justin suffered a psychiatric shock, and sued the hospital as a secondary victim. The hospital sought to have the case struck out on the basis that he had not been in close proximity in space and time to the relevant event and that his psychiatric shock did not result from a sudden, unexpected and exceptional shock.

The court refused the striking out application.

"I find that the Claimant has a good arguable case that his psychiatric shock did not result from a retrospective process but from a sudden, unexpected and exceptional shock, which all occurred within 25 minutes from him first seeing body parts on the railway line, receiving a telephone call from his ex-wife and returning to the railway bridge, where he saw the remains of, as he now knew, his son. In my judgment it is artificial to consider the telephone call separately from the two visits to the railway bridge as they form part of one whole." per Master Roberts at para 24

13 SECONDARY VICTIMS: Proposed Reform

The Draft Negligence (Psychiatric Illness) Bill 1998

13.1 The seemingly arbitrary rules relating to the claims of secondary victims have been the subject of some adverse criticism.

Sion v. Hampstead Health Authority [1994] 5 Med LR 170

"It is recognised almost universally that the common law ought to impose some limit on the circumstances in which a person can recover damages for the negligence of another. The common law has to choose a frontier between those whose claims succeed and those who fail. Even the resources of insurance companies are finite, although some jurists are slow to accept that. For the present the frontier for one type is authoritatively and conclusively fixed by the House of Lords (in Alcock's case)." per Staughton LJ

13.2 **Law Commission Consultation Paper No. 137, Liability for Psychiatric Illness. 1995**

"For the law to distinguish the claims for shock-induced psychiatric illness of one mother present at the scene of her son's death or its immediate aftermath from that of another mother who was not present at the scene but came across the aftermath several hours later, or who heard about the incident from a friend or saw it on television, might justly give rise to accusations of arbitrary and insensitive line-drawing."

13.3 **White v Chief Constable of South Yorkshire Police [1999] 2 AC 455**

"My Lords, the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury… But that would be contrary to precedent and, in any event, highly controversial. Only Parliament could take such a step. The second solution is to abolish all the special limiting rules applicable to psychiatric harm. That appears to be the course advocated by Mullany and Handford, Tort Liability for Psychiatric Damage. They would allow claims for pure psychiatric damage by mere bystanders: see (1997) 113 L.Q.R. 410, 415. Precedent rules out this course and, in any event, there are cogent policy considerations against such a bold innovation. In my view the only sensible general strategy for the courts is to say thus far and no further.

"The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the Alcock case [1992] 1 AC 310 and Page v. Smith [1996] AC 155 as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform." per Lord Steyn at page 500

13.4 On March 10th 1998, the Law Commission published a proposed Bill to reform the law relating to secondary nervous shock victims. The Bill, if it had been adopted, would have had the following effects:

1. A secondary victim would not need to prove that they were present at the accident or came upon the aftermath within a limited time. It will be enough to show that the injury to their loved one caused a reasonably foreseeable psychiatric illness, no matter how or when they discovered the injury.

2. The psychiatric illness will not have to have been caused by a sudden shock. A gradual realisation of the horror of the situation will suffice.

3. The categories of 'loved ones' with an automatic right to be considered will be extended to include brothers and sisters, and cohabitees of two years or more, even if their relationship is a homosexual one.

13.5 Thus, the first control mechanism in *Alcock v. CCSYP* would have been relaxed, and the other two would be eliminated. This Bill was never enacted and so does not represent the current law, which the House of Lords/Supreme Court has made clear is as represented by the speeches in *Alcock v. CCSYP*. However, it may indicate something about changing social attitudes towards non-married and same sex couples, particularly in light of the later law permitting same-sex marriages.

14 SECONDARY VICTIMS: Further Limitations

14.1 A further development came in the extraordinary decision in *Greatorex v. Greatorex* [2000] in which the chances of both primary and secondary victims were reduced for questionable policy reasons.

14.2 **Greatorex v. Greatorex [2000] 1 WLR 1970**

John Greatorex had been out drinking with his friend, Haydon Pope. Greatorex drove Pope's car from the pub and crashed it whilst driving on the wrong side of the road. He hit his head and was unconscious and trapped in the car. The fire brigade came to the rescue, and who should the leading fire-officer be but Christopher Greatorex, John's father! As a result of seeing his son's injuries, Christopher suffered PTSD, and so sued John for negligence.

The issue in the case was whether a primary victim owed a duty of care to a third party in circumstances where his self-inflicted injuries caused that third party psychiatric injury. The issue was complicated by the fact that the primary victim and the third party were father and son.

In the course of his judgment, Cazalet J made several observations.

i) The claimant as rescuer

It had been argued that Christopher should be able to make a claim as a primary victim as he was a rescuer. However, it was clear that he was in no physical danger himself and so, following *White v. CCSYP*, Cazalet J. held that he could not succeed on this ground.

ii) The claimant as a father

As a father attending the immediate aftermath of an accident, Christopher did seem to be a secondary victim within the categories of *Alcock v. CCSYP*. However, given the unusual facts of this case, Cazalet held that his claim must **fail** as a matter of policy.

a) As the defendant's injuries were self-inflicted (albeit accidentally) to make him liable to those who suffered mental (as opposed to physical) injury as a result of them would be to deprive him of his right to injure or even kill himself as he thought fit!

b) Furthermore, the claimants in such cases would have to be 'loved ones' (to meet the *Alcock* criteria) and upsetting one's loved ones was a normal part of everyday life for which it would be impolitic to provide a remedy.

"The first Alcock control mechanism means that such claims must of necessity be between close relatives. Regrettably, the suffering of close relatives for self-induced or natural reasons is an inherent part of family life. It is only when someone else inflicts the injuries that the incident is taken out of the category of everyday family life and into the law of tort...Tragedy and misfortune may befall any family. Where the cause arises within the family there would, in my view, have to be good reason for further extending the law to provide a remedy in such a case.

"That takes me to a related point, which in my view is of some importance. Home life may involve many instances of a family member causing himself injury through his own fault. Should the law allow one family member B to sue another family member A or his estate in respect of psychiatric illness suffered as a result of B either having been present when the injury was sustained or having come upon A in his injured state? Mr. Mason argues that such claims will be rare, because such events will not normally cause psychiatric illness, and because the courts may be expected strictly to enforce the requirement that a secondary victim must show that the circumstances were such that a person of normal fortitude might foreseeably suffer psychiatric harm. That may be so, but experience shows that it is not only successful claimants who sue. To allow a cause of action in this type of situation is to open up the possibility of a particularly undesirable type of litigation within the family involving questions of relative fault as between its members." per Cazalet J at p.1985

15 PROPERTY DAMAGE

15.1 Some cases do not seem to fit within either the *Alcock v. CCSYP* or the *Page v. Smith* model. If the claimant did not fear for either his own safety or that of a loved one, he may rely simply on the usual rules of negligence – duty of care, breach and causation – without reference to the control mechanisms.

15.2 This means that one has a better chance of succeeding if a beloved pet is injured infront of one's eyes than if it were a brother! This is because shock consequent to property damage would not – strictly speaking – be 'pure nervous shock' as there would be some physical damage as well. What though if you reasonably thought your property had been destroyed, when in fact it had not?

15.3 **Attia v. British Gas plc [1988] 1 QB 304 (CA)**

The defendants set fire to the plaintiff's house whilst installing central heating, thus providing a little more heating than she was expecting! The fire raged for four hours, in which time the house and its contents were extensively damaged. The plaintiff suffered nervous shock. The Court of Appeal held that a psychiatric illness caused by property damage could support a claim in damages, provided it went beyond mere grief or emotional distress.

"I cannot conceive that, if the injury which the plaintiff alleges that she suffered was a foreseeable consequence of the defendant's negligence, there could be any overriding policy reason for preventing her recovering damages." per Woolf LJ at p.317

"Suppose, for example, that a scholar's life's work of research or composition were destroyed before his eyes as a result of a defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage. Or suppose that a householder returned home to find that his most cherished possessions had been destroyed through the carelessness of an intruder in starting a fire or leaving a tap running, causing reasonably foreseeable psychiatric damage to the owner. I do not think a legal principle which forbade recovery in these circumstances could be supported."

per Bingham LJ at p.320

15.4 Some commentators think that this case beggars belief. Why can you successfully claim for seeing your house burn down but not for seeing your brother killed? However, the validity of the case was not considered by the House of Lords in any of the succeeding cases on secondary victims and, as such, it is still good law.

15.5 Indeed, the case was considered without any disapproval in the Court of Appeal judgment of *Jonathan Yearworth v. North Bristol NHS Trust* [2009] QB 1

15.6 **Jonathan Yearworth v. North Bristol NHS Trust [2010] QB 1 (CA)**

Six men who were undergoing chemotherapy for cancer, produced sperm samples to be preserved by the defendant in case the treatment made them infertile. Due to the negligence of the defendant in not keeping the sperm frozen, it perished, and the claimant men suffered from PTSD. (Three of them later recovered their fertility; one was shown to be unlikely to have been able to father a child anyway; and one died!)

There were several issues arising from this case, including the question of whether a man can claim ownership of his sperm once it has been ejaculated! The Court of Appeal held that in these circumstances the men did continue to own their sperm, and so the NHS Trust had destroyed their property in breach of a bailment. On that basis, and applying the distress principles in the contract cases such as Farley v. Skinner, the claim was allowed.

On the matter of psychiatric injury in tort, the court made the following *obiter* observation:

"In Attia v. British Gas, D, who was installing central heating in C's home, negligently set it on fire. For four hours she witnessed her home ablaze. This court held that, subject to proof of causation and foreseeability, she could recover for psychiatric injury sustained as a result of it. Bingham LJ, at 320E, gave a different example of where recovery would lie, namely if "a scholar's life work of research or composition were destroyed before his eyes as a result of the defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage".

"It will be noted that the facts both of Attia and of Bingham LJ's different example are of injury to the person who witnesses damage to his property and in consequence suffers psychiatric injury and the person who receives information about damage to it and suffers similarly. On the other hand the distinction does no more than to replicate what, for policy reasons, has been drawn in relation to the so-called secondary victim who foreseeably suffers psychiatric injury as a result of personal *injury which the primary victim suffers, or to which he is exposed, as a result of the defendant's negligence: Alcock v. Chief Constable of South Yorkshire Police [1992] 1 AC 310 . At all events, in the light of what follows, there is no need for us to consider the distinction any further."*

per Lord Judge CJ at para 55

16 STRESS AT WORK

16.1 It has long been that case that an employee may claim damages for psychiatric injury caused by stress at work. In such cases, there is clearly no need for a 'sudden shock'.

16.2 **Walker v Northumberland CC [1995] 1 All ER 737**

W, who was responsible for four teams of social services fieldworkers employed by the NCC, suffered a mental breakdown in November 1986 and was forced to spend four months away from work. This breakdown followed a lengthy period over which W's work pressures increased significantly and, despite repeated attempts to do so, he had not persuaded the NCC either to increase staff or provide guidance as to work distribution or prioritisation. Upon his return he was offered no additional support from the NCC and by September 16, 1987 he was advised to go on sick leave and suffered a second mental breakdown. He was dismissed on the grounds of permanent ill-health in February 1988 and brought an action for damages against the NCC for breach of their duty of care to take reasonable steps to avoid exposing him to a health-endangering workload.

Held: An employer's duty to take reasonable care to provide his employee with a safe system of work and take reasonable steps to prevent him from risks which are reasonably foreseeable extended to risks of psychiatric illness. W's claim for damages was thus upheld.

16.3 However, it is necessary for the employee to show that a harmful reaction to the pressures of his or her workplace was reasonably foreseeable in the circumstances. Unless there is some clear contra-indication, an employer is entitled to suppose that an employee could cope with the normal pressures of the job.

16.4 **Hatton v. Sutherland County Council [2002] 2 All ER 1 (CA)**

Four cases were joined concerning the liability of an employer for an employee's psychiatric illness caused by stress at work. Only one of the claimants **–** who had frequently complained about being overworked **–** was successful. The employees' illnesses in the other cases were not reasonably foreseeable by the employers.

Mrs. Hatton taught French for fifteen years at a comprehensive school in Liverpool between 1980 and 1995. She had taken two months off with depression in 1989 following the break-up of her marriage, but on her return, she seemed to be enjoying her work and coping with it. The introduction of a modular GCSE French course in 1992 and the use of supply teachers increased her workload outside school, but she did not complain and nobody knew about it. For much of 1994 she was off work, but she did not tell anyone it was because she was feeling overworked: instead, she blamed certain traumas that were happening in her family life to explain her absences. She eventually suffered a psychiatric illness caused by stress at work and had to retire.

The court held that her employers were not responsible, as the school could not reasonably have foreseen that she would suffer such an illness, particularly as she had deliberately kept her stress so well hidden.

16.5 A similar decision was reached in *Sayers v. Cambridgeshire CC* [2007] IRLR 29, where Sayers, an operations manager for a local authority, was forced to leave her job, as the pressure and stress of it led to a psychiatric illness. Despite her having had several tearful episodes and time off work, the employers were not liable, as Sayers had deliberately concealed from them that her tears and absences were caused by depression, and they had no reason, therefore, to suspect it.

16.6 One of the other unsuccessful claimants in the composite judgment in *Hatton v. Sutherland County Council* successfully took his case to the House of Lords in the case of *Barber v. Somerset County Council* [2004], where the principles to be considered in such judgments were clarified by Lord Walker.

16.7 **Barber v. Somerset County Council [2004] 2 All ER 385 (HL)**

Leon Barber was a teacher at East Bridgewater Community School. He was forced into early retirement at the age of 52 after suffering a mental breakdown at the school. He claimed that his employers were responsible for his serious depressive illness.

Following a restructuring of staffing at the school. Barber had lost his post as Head of a Department and had to take on a great deal of extra work to make up his salary cut, typically working between 61 to 70 hours a week. He had complained of work overload to a member of the senior management and had been off work for three weeks with depression. (When he returned, he found that no-one had done his work in his absence, so his pigeonhole had 'exploded' with the backlog!) His mental health was not helped by the 'autocratic and bullying style of leadership' of the head teacher, Mrs. Hayward. (Sounds familiar?)

Despite Barber's obvious problems, no steps were taken by the school to investigate or remedy the situation. The trial judge found in favour of Barber, but the Court of Appeal overturned this. The House of Lords restored the original ruling in favour of Barber. The reported facts did not reveal a clear case either way, but the trial judge had seen and heard the witnesses and there was insufficient reason for the Court of Appeal to set aside his finding.

"My Lords, the issue of breach of the council's duty of care to Mr. Barber was in my view fairly close to the borderline. It was not a clear case of a flagrant breach of duty any more than it was an obviously hopeless claim. But the judge, who saw and heard the witnesses…came to the conclusion that the employer was in breach of duty, and in my view, there was insufficient reason for the Court of Appeal to set aside his finding." per Lord Walker at para 67

"It was argued that the school as a whole was facing such severe problems (with all the teachers stressed and overworked, no budget for more staff, and the Ofsted inspection looming) and that there was nothing that the school could have done to help Mr. Barber other than advising him to resign… I would not accept that. At the very least the senior management team should have taken the initiative in making sympathetic inquiries about Mr. Barber when he returned to work, and making some reduction in his workload to ease his return. Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might by itself have made a real difference. In any event, Mr. Barber's condition should have been monitored, and if it did not improve, some more drastic action would have had to be taken. Supply teachers cost money, but not as much as the cost of the permanent loss through a psychiatric illness of a valued member of the school staff."
per Lord Walker at para 68

16.8 This case was applied in *French v Sussex CC* [2005] PIQR 18.

French v Sussex CC [2005] PIQR 18

F was a police officer who had been involved in an investigation that had resulted in the fatal shooting of a suspect. Following the shooting an independent police force had carried out an inquiry pursuant to which criminal charges were brought against F. Although F was acquitted, he was later subjected to internal disciplinary proceedings. As a result of all this stress, F suffered a psychiatric illness. F claimed that S had failed to maintain a safe system of work, which had led to the fatal shooting with the foreseeable consequences that F would be blamed, charged and disciplined; that it had failed properly to manage the post-acquittal process, and that it ought to have foreseen, but had not, that such failings would cause him stress and psychiatric harm.

S submitted that the damage claimed was too remote and applied for the case to be struck out as revealing no prospect of success.

Held, granting that application, that F had no real prospect of successfully claiming that he had suffered damage as a result of any corporate failure on the part of S that had resulted in the fatal shooting.

Following the reasoning in *White v. CCSYP*, F was neither a primary nor a secondary victim.

Furthermore, following *Barber v. Somerset CC,* there was no real prospect of F successfully arguing that psychiatric injury had been caused by undue stress at work as there were no signs that F was particularly vulnerable to stress and at risk of personal injury even after the shooting.

16.9 The same reasoning was successful for the defendant in a Scottish case.

Keen v. Tayside Contracts [2003] SLT 500

Rory Keen, a road worker, was instructed by his supervisor, Mr. Colville, to attend a road traffic accident in Dundee in order to assist the emergency services by setting up a traffic diversion. Whilst at the scene of the accident he saw a body crushed and burned in a car... then another... and another… and another! In fact, there were four such bodies on view. He asked for permission to leave the scene as he was not trained for such a situation, but was told to stay to assist the police. As a result of this traumatic experience, he developed PTSD.

He sued his employer, claiming that he was a primary victim of his employer's negligence, and so he was not subject to the control mechanisms of *Alcock v. CCSYP*. Alternatively, he claimed as an employee who had been put under undue stress by his employer.

HELD: He was clearly a secondary victim, and as he had no close ties of love and affection with the immediate victims, he had no cause of action in that respect.

In order to claim on the basis of undue stress at work, he would have had to show that something about his personal circumstances should have alerted his employers to the fact that his exposure to the accident might result in a real risk of his suffering a psychiatric illness, and there was nothing in either his work, personal or medical records to show this. Therefore, his action failed on that account also.

16.10 However, the test is simply one of reasonable foreseeability, so if the worker were sent to an incident which should have been foreseen to cause him nervous shock, even though he had no obvious predisposition for it, that would be enough. Lady Paton gave the example of an employer insisting that a worker attend an accident which involved the employee's son, though he would then probably fulfil the Alcock requirements as a secondary victim anyway.

16.11 *Barber v. Somerset CC* was also applied in several cases involving bullying at work.

16.12 **Green v. DB Group Services (UK) Ltd. [2006] EWHC 1898**

A female Company Secretary was subjected to a relentless campaign of spiteful behaviour by a group of women at work.

16.13 **Clark v. The Chief Constable of Essex Police [2006] EWCA 2290**

A detective was bullied by his colleagues to the point of shingles!

16.14 **Faithful v. AXA PPP Healthcare (2011)**

Licia Faithful, 31, complained that she suffered post-traumatic stress disorder and depression after being ridiculed by co-workers in the claims department of AXA PPP Healthcare, the medical insurance firm, where she earned £17,765 a year***.***

Staff in the office in Tunbridge Wells, Kent, recorded her voice and played it back to her, laughing and mimicking her accent. They referred to the mother-of-one as SpongeBob SquarePants, a character on the Nickelodeon cartoon channel that has a grating nasal voice. By the end of 2008 she had been left in such an emotional state after months of mockery that she was unable to complete even basic household tasks.

She was awarded a total payout of just under £142,000. The award was broken down into four categories; £81,740 for racial and other discrimination, £10,012 damages, £24,765 for hurt feelings and £25,473 for personal injury.

16.15 Employees may be denied a remedy for policy reasons.

White v. Chief Constable of South Yorkshire Police [1999] 2 AC 455 (HL)

The police also claimed that they were owed a special duty of care by the Chief Constable as they were his employees whom he had negligently put in a traumatic position, contrary to their contract of employment. (The police are not technically 'employed' by the Chief Constable, though the House of Lords ignored this technicality.) However, the Lords held that there is no special duty owed to the police by their employers in this respect, and policy considerations would not support such an extension of duty.

"First, the pragmatic rules governing the recovery of damages for pure psychiatric harm do not at present include police officers who sustain such injuries while on duty. If such a category were to be created by judicial decision, the new principle would be available in many different situations, e.g. doctors and hospital workers who are exposed to the sight of grievous injuries and suffering.

"Secondly, it is common ground that police officers who are traumatised by something they encounter in their work have the benefit of statutory schemes which permit them to retire on pension. In this sense they are already better off than bereaved relatives who were not allowed to recover in the Alcock case." per Lord Steyn at p.498

17 STRESS IN PRISON

17.1 Being in prison can be stressful for both the staff and the inmates.

17.2 **Hartman v. South Essex Mental Health and Community Care NHS Trust [2005] ICR 782 (CA)**

Six cases were heard together involving the liability of employers. In one of the cases, a health care officer employed by the Home Office at Exeter Prison was repeatedly asked to attend the aftermath of prison suicides. After the eighth occasion – when he had to cut down the body of a hanging prisoner – he suffered a psychiatric injury.

The Court of Appeal held that a primary duty of care was owed to the claimant by the defendant in such circumstances (though the issue of breach was not resolved in the case).

17.3 **Butchart v. Home Office [2006] 1 WLR 1155 (CA)**

Butchart was on remand in Winchester Prison. He was known to be psychiatrically vulnerable and suicidal, but despite this he was placed in a cell with another remand prisoner – Ian Holms – who was also known to be suicidal. (Ian Holms had been moved out of another cell when his cell-mate complained about him for being so depressing.) Holms repeatedly told Butchart that he was planning to kill himself, but put him under considerable psychological pressure not to tell anyone else. A few days later, Butchart discovered Holms dead after he had hanged himself from the bed post.

The prison officer told Butchart that if anyone was to blame for Holms' death, it was Butchart! Butchart was then put into a cell with another suicidal prisoner – Andrew Page – who attempted to hang himself as well.

As a result of all this, Butchart developed an adjustment disorder, increasing his own suicide risk. He sued the Home Office for their negligence in causing him this psychiatric injury.

The Home Office applied to have the case struck out as disclosing no cause of action. They pleaded that Butchart could not claim as a secondary victim, as he did not have a close tie of love and affection with the deceased.

However, the Court of Appeal, relying on the decision in *Hartman v. South Essex Mental Health and Community Care NHS Trust*, considered that the Alcock control mechanisms were irrelevant to this case. Butchart was not suing as a secondary victim, but rather as a primary victim, akin to an employee who has been put under abnormal stress by his employer. On that basis, there was at least a case to answer, and the striking out action was denied.

17.4 On March 15th 2006, six prison officers were awarded £1,000,000 between them for the shock they had suffered at Cardiff jail when they witnessed Jason Ricketts about to eat the heart of fellow prisoner, Colin Bloomfield, whom he had throttled to death and hacked up with a razor blade. He had removed the spleen and liver, and gouged out the right eye. The Home Office admitted liability.

18 FEAR OF CONTRACTING AN ILLNESS

18.1 The House of Lords has considered whether an employee who was exposed to the risk of an illness by his employer could claim as a primary victim if his fear of contracting the illness led him to develop a psychiatric injury. The answer appears to be – not unless the psychiatric illness was a reasonably foreseeable reaction in the circumstances in a person of normal fortitude.

18.2 **Grieves v FT Everard & Sons Ltd/ Rothwell v. Chemical & Insulating Co. Ltd. [2008] AC 281**

Several cases were heard together involving employees of the defendant who had been negligently exposed by their employers to asbestos dust. Each claimant developed pleural plaques, which, whilst not in themselves a health problem, indicated exposure to asbestos which, if continued, might one day lead to a long-term asbestos related disease.

One of the claimants – John Grieves – developed a depressive illness as a result of an unfounded fear that his exposure to asbestos thus far, would cause him to develop asbestosis. He claimed, *inter alia*, for this depressive illness, on three grounds:

i) That he was a *Page v. Smith* primary victim; or
ii) That his case could be brought within the stress at work line of cases; or
iii) This was a novel claim for which a new duty of care could be established

He failed on all grounds. The Court of Appeal (2006) 4 All ER 1161, distinguished *Page v. Smith,* where there had been an immediate threat of physical injury to the claimant and as a matter of policy, they refused to extend the doctrine to cases such as this.

"We do not consider that the test in Page v. Smith can properly be extended so as to render a defendant who negligently exposes a claimant to the risk of contracting a disease liable for free-standing psychiatric injury caused by the fear of contracting the disease. In so holding we are mindful of the view expressed by Lord Steyn in White v. Chief Constable of the South Yorkshire Police [1999]: 'The law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify… In my view the only sensible general strategy for the courts is to say thus far and no further.' per Lord Phillips (in the Court of Appeal) at para 90

Grieves also failed on the second ground. The Court noted that in the stress at work cases it was necessary for the claimant to prove that the psychiatric illness was foreseeable in a person of reasonable fortitude. If that test were applied here, this claimant would fail.

Finally, if 'nervous shock caused by the unfounded fear of contracting a particular disease' were to be considered as a potential new species of duty of care, his claim would also fail. Such an extension of duty of care was contrary to public policy (including floodgates problems and the consequent cost to the Health Service); and was not supported by established principle.

19 MORTIFICATION AND HUMAN RIGHTS

19.1 There is an interesting case concerning extreme embarrassment.

Wainwright v. Home Office [2004] 2 AC 406 (HL)

The facts of the case are explained in para 13.8 above. This case also confirms that there is no general common law tort of invasion of privacy… yet. However, the Wainwrights took the case to the European Court of Human Rights, where they had more success.

19.2 **Wainwright v. The United Kingdom (2007) 44 EHRR 40**

The Wainwrights claimed that the strip-searching infringed Article 3, Article 8 and Article 13 of the Convention.

Article 3 provides that no-one shall be subjected to torture or to inhuman or degrading treatment or punishment. However, comparing this case to other strip-search cases that they had considered, the Court thought that although the guards had shown a 'regrettable lack of courtesy' and undoubtedly caused the applicants distress, the treatment had not reached the minimum level of severity prohibited by Article 3, so there was no violation.

Article 8 provides that everyone has the right to respect for his private life, but there is an exception to this *inter alia* where interference is necessary in a democratic society for the prevention of crime. Whilst recognising that the authorities were in legitimate pursuit of the prevention of crime, the Court held that the searches were disproportionate to that aim in the manner in which they were carried out. In particular, there was no excuse for disregarding the Code of Practice, which had been established to protect the dignity of those being searched. Thus, there was a violation of Article 8.

Article 13 requires that everyone whose rights have been violated under the Convention shall have an effective remedy before a national authority. The Court noted that the House of Lords found that the negligent actions by the prison guards in the conduct of the strip-search did not ground any civil liability as there was no general domestic tort of the invasion of privacy. This meant that there was therefore no domestic way to enforce the Article 8 privacy rights, and this was thus a violation of Article 13.

The applicants were each awarded EUR 3,000.

20 TRYING IT ON

20.1 The difficulties in establishing nervous shock claims have not deterred some unlikely litigants.

Fagan v. Goodman (2001) QBD 30.11.2001 Unreported

Graham Goodman negligently changed lanes on the M25 in the path of a police motorcyclist who consequently crashed into the central reservation of the M25. The police officer's arm was severed and he was killed.

Elizabeth Fagan (aged 39) was driving behind Goodman at the time of the accident and witnessed it. She went to the aid of the police officer, and as a result of finding him dead suffered post-traumatic stress disorder. This was made worse by her existing personality disorder.

According to her original statement and the evidence of witnesses, neither she nor her passengers were in any immediate personal danger because of the accident. However, having received some legal advice, she claimed to have feared for her life and those of her children as she had to swerve across the busy motorway and as the debris from the accident crashed into her car. She also claimed to have suffered severe whiplash injuries.

The judge found that none of these later statements were true: She was not significantly close to the accident, was in no personal danger and did not suffer any physical injury as a result of the accident. In short, she was not a primary victim **–** just a rather inventive liar.

As an unrelated secondary victim, she had no claim under the *Alcock* tests and so her claim failed.

SECTION TWO: PRIVATE NUISANCE

21 INTRODUCTIONS AND DEFINITIONS

21.1 Private Nuisance is a land-based tort. It occurs when someone causes unreasonable, and therefore illegal, interference to someone's enjoyment of their property. There have been various attempts to define the tort.

21.2 **Aldred's Case (1610) 9 Co. Rep. 57b**

"Sic utere tuo ut alienum non laedas"… "Use your own property so as not to injure your neighbour's."

This maxim is generally considered to be misleading as it does not address the issue of when interference becomes unlawful. It has been judicially described as "mere verbiage." (*Bonomi v. Backhouse* (1858) EB & E, 622 at p. 643.)

21.3 **Sedleigh-Denfield v. O'Callaghan [1940] AC 880**

"Like most maxims, it is not only lacking in definiteness but is also inaccurate. An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners and yet be free from liability... A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society. The forms which nuisance may take are protean." per Lord Wright at p. 903.

21.4 **Read v. Lyons & Co. Ltd. [1945] KB 216 (CA)**

"Private nuisance is unlawful interference with a person's use or enjoyment of land, or some right of way over, or in connection with it." per Scott LJ at p. 236

21.5 **Southport Corp. v. Esso Petroleum Co. Ltd. [1956] AC 218**

"Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property." at p. 224

21.6 **Miller v. Jackson [1977] QB 966 (CA)**

"It is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour." per Lord Denning M.R. at p.980

21.7 **Hunter v. Canary Wharf Ltd. [1997] 2 WLR 684 (HL)**

"Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land." per Lord Lloyd at p.698

21.8 **Baxter v. Camden LBC (No.2) [1999] 3 WLR 939 (HL)**

"Nuisance involves doing something on adjoining or nearby land which constitutes an unreasonable interference with the utility of the plaintiff's land." per Lord Hoffmann at p.950

21.9 **Lawrence v. Fen Tigers Ltd. [2014] AC 822 (SC (E))**

"A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in Sedleigh-Denfield v. O'Callaghan [1940] AC 880, 903: 'A useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society'."

per Lord Neuberger at para 3

21.10 Most of these definitions suggest that an act of nuisance will be done by an adjoining landowner. Although this is generally true, it is not necessary for the defendant to be the neighbour of the claimant.

21.11 A more general definition, which has been judicially accepted (e.g. in *Church of Jesus Christ of Latter Day Saints v. Price* [2004] EWHC 3245) comes from Clark and Lindsell on Torts**:**

"Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of…his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land."

21.12 The principles of the cause of action for private nuisance were recently summarised by Sir Terence Etherton MR in the Court of Appeal in *Williams v. Network Rail Infrastructues Ltd*. [2019] QB 601, and again in *Fearn v. Tate Gallery* [2020] EWCA Civ 104.

Fearn v. Tate Gallery [2020] EWCA Civ 104 (See para 27.8 below)

Sir Terence Etherton MR

31. First, a private nuisance is a violation of real property rights. It has been described as a property tort. It involves either an interference with the legal rights of an owner or a person with exclusive possession of land, including an interest in land such as an easement or a profit à prendre, or interference with the amenity of the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession…

32. Second, although private nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights. In Hunter's case, at p 695C, Lord Lloyd said that nuisances are of three kinds:

(1) nuisance by encroachment on a neighbour's land;

(2) nuisance by direct physical injury to a neighbour's land; and

(3) nuisance by interference with a neighbour's quiet enjoyment of his land.

33. The difficulty, however, with any rigid categorisation is that it may not easily accommodate possible examples of nuisance in new social conditions or may undermine a proper analysis of factual situations which have aspects of more than one category but do not fall squarely within any one category, having regard to existing case law.

34. Third, the frequently stated proposition that damage is always an essential requirement of the cause of action for nuisance must be treated with considerable caution. It is clear both that this proposition is not entirely correct and also that the concept of damage in this context is a highly elastic one. In the case of nuisance through interference with the amenity of land, physical damage is not necessary to complete the cause of action. To paraphrase Lord Lloyd's observations in Hunter, at 696C, in relation to his third category, loss of amenity, such as results from noise, smoke, smell or dust or other emanations, may not cause any diminution in the market value of the land, such as may directly follow from, and reflect, loss caused by tangible physical damage to the land, but damages may nevertheless be awarded for loss of the land's intangible amenity value.

35. Fourth, nuisance may be caused by inaction or omission as well as by some positive activity.

36. Fifth, the broad unifying principle in this area of the law is reasonableness between neighbours.

21.13 The issues to consider in a private nuisance case are as follows:-

1) Who can sue for nuisance?
2) Who can be sued for nuisance?
3) What amounts to 'interference with land'?
4) What makes interference 'unreasonable'?
5) What defences are there to private nuisance?
6) What are the remedies for private nuisance?

23 WHO CAN SUE FOR NUISANCE?

i. The general rule

22.1 In order to bring an action for nuisance, one must have **an interest in the property** affected. The action is brought for **interference with the land**, not for personal inconvenience.

"In true cases of nuisance, the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens. It is for this reason that the plaintiff in an action for nuisance must show some title to realty."

Newark, The Boundaries of Nuisance (1949) 65 LQR 480 at p.482

22.2 Following this logic, you **cannot** bring an action for **personal injury** in private nuisance – even if you are the landowner and have suffered the injury whilst on the land – as this would not amount to interference with the use of the land itself. However, you **can** claim for **the loss of utility of the land** caused to you by having to endure the injurious conduct whilst there!

e.g. If the smoke from your neighbour's bonfire blinds you, you can claim for the consequent reduction in the utility of your property (and for any property damage it causes) but not for the blindness (for which you should claim in negligence instead).

22.3 **Hunter v. Canary Wharf Ltd. [1997] AC 655 (HL)**

"If the occupier of land suffers personal injury as a result of inhaling the smoke [from a neighbouring factory], he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his personal *injury, nor for interference with his* personal *enjoyment. It follows that the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question. It also follows that the only persons entitled to sue for loss in amenity value of the land are the owner or the occupier with the right to exclusive possession."* per Lord Lloyd at p.696

22.4 Although the claimant must have an interest in the property concerned, it need not be a provable legal title.

Foster v. Warblington Urban District Council [1906] 1 K.B. 648 (CA)

The plaintiff was an oyster merchant who had for many years been in occupation of some oyster beds on the foreshore. Even though he had no actual title to the foreshore, he excluded everybody from the oyster beds, and nobody interfered with his occupation of the oyster bed or his removal and sale of the oysters from them. The defendant council discharged sewage over the oyster beds, and the plaintiff sued them for nuisance.

HELD: He had a right of action, despite the fact that he could not prove his legal title to the oyster beds. A *de facto* title was enough.

22.5 However, it is not enough simply to be married to the owner of the property, if you do not have any title to it yourself.

Malone v. Laskey [1907] 2 KB 141 (CA)

The plaintiff was the wife of a tenant who suffered an injury when a toilet cistern fell on her due to the vibrations of the defendant's electricity generator next door. HELD: She could not claim in nuisance as she had no possessory right to the land.

"Many cases were cited in the course of the argument in which it had been held that actions for nuisance could be maintained where a person's rights of property had been affected by the nuisance, but no authority was cited, nor in my opinion can any principle of law be formulated, to the effect that a person who has no interest in property, no right of occupation in the proper sense of the term, can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house. On that point, therefore, I think that the plaintiff fails, and that she has no cause of action in respect of the alleged nuisance." per Sir Gorell Barnes P. at p.151

ii. An attempt to overturn the general rule

22.6 This requirement of a proprietary interest or possessory title was (temporarily) overturned by the Court of Appeal in *Khorasandjian v. Bush* [1993].

Khorasandjian v. Bush [1993] 3 WLR 476 (CA)

The daughter of a householder was harassed by abusive telephone calls from her ex-boyfriend. HELD: She was entitled to an injunction to prevent him from 'harassing, pestering or communicating with' her, even though she had no proprietary interest in the premises in which she received the calls.

iii. Restoring the rule

22.7 *Khorasandjian v. Bush* was overruled by the House of Lords in *Hunter v. Canary Wharf Ltd.* [1997].

Hunter v. Canary Wharf Ltd. [1997] AC 655 (HL)

In 1990 the Canary Wharf Tower was built in an Enterprise Zone in East London. The tower is about 250 metres high, over 50 metres square and is clad in stainless steel. 690 plaintiffs sued the builders for damages in negligence and nuisance as the existence of the tower interfered with the reception of television broadcasts at their homes in East London. (By the time of the action, the BBC had rectified the problem by building a relay transmitter.) Many of those who sued were not householders themselves, but spouses, children and lodgers of householders. The majority of the House of Lords rejected the decision in **Khorasandjian v. Bush**, and held that the plaintiff in a nuisance action must have a possessory interest in the land, and not just a mere licence.

"If a plaintiff, such as the daughter of the householder in Khorasandjian v. Bush, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home...

"On the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally however, as Foster v. Warblington Urban District Council shows, this category may include a person in actual possession who has no right to be there; and in any event a reversioner can sue in so far as his reversionary interest is affected. But a mere licensee on the land has no right to sue…

"I would therefore hold that Khorasandjian v. Bush must be overruled in so far as it holds that a mere licensee can sue in private nuisance." per Lord Lloyd at p. 697

22.8 A claimant such as the one in *Khorasandjian v. Bush* could now bring an action under the Protection from Harassment Act 1997. For an example of telephone harassment, see *Church of Jesus Christ of Latter Day Saints v. Price* [2004] EWHC 3245.

22.9 A person who resides at a property affected by the adverse actions of a public authority, but who has no interest in the property itself, might have an independent claim under the HRA 1998 (Art. 8 of the ECHR) to the extent that the award to the proprietor does not compensate him or her for his own loss of amenity.[1]

iv. The claimant must have an interest in the affected land

22.10 Although the tort is designed to protect interests in land, the definition of 'land' has been stretched to include a floating barge permanently attached to a mooring on the bed of the River Thames.[2]

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[1] *Dobson v. Thames Water Utilities Ltd.* [2009] EWCA Civ 28.

[2] *Crown River Cruises Ltd. v. Kimbolton Fireworks Ltd.* [1996] 2 Lloyd's Rep. 533.

23 THE POSSIBLE DEFENDANTS: THE PERSON WHO IS CREATING OR HAS CREATED THE NUISANCE

23.1 There is a variety of potential defendants in an action for private nuisance, including:

i. The person who is creating the nuisance
ii. The occupier of the land from which the nuisance emanates
iii. The landlord of the person who is creating the nuisance

23.2 The most obvious person to sue is the person who is creating the nuisance, especially if the claimant is seeking an injunction to get the nuisance-maker to stop, and this is what most cases are about.

23.3 The person who creates a continuing nuisance may be liable for it, even if he no longer owns the land.

Roswell v. Prior [1701] 12 Mod 635

A defendant built a house which obstructed the plaintiff's ancient lights, and then assigned his lease. HELD: He was still liable for the nuisance, even though he was no longer able to prevent it.

23.4 Furthermore, the creator of a continuing nuisance will be liable to successive neighbours.

Delaware Mansions Ltd. v. City of Westminster [2002] 1 AC 321 (HL)

In 1989 structural engineers found that cracking in a block of flats in Maida Vale was caused by the presence of a nearby plane tree on the public footpath, the roots of which were desiccating the ground. Although aware of the problem, Westminster Council declined to remove the tree.

In 1990, Flecksun acquired the freehold of the block of flats. They spent £570,734.98 to have a root barrier inserted and to underpin the foundations. They claimed this sum from Westminster Council, alleging nuisance.

Westminster said they were not liable to the appellants as the nuisance existed before the appellants became owners. It was held that this fact was irrelevant, and the council was liable for the continuing nuisance to the new owners of the flats.

24 THE POSSIBLE DEFENDANTS: THE OCCUPIER OF THE LAND

24.1 An occupier can be liable for a nuisance even if he did not create it, if he does not take reasonable steps to abate it.

Sedleigh-Denfield v. O'Callaghan [1940] AC 880 (HL)

The defendants were liable when a water pipe under their control became blocked with leaves during a heavy rainstorm and flooded the plaintiffs' land. The pipe had been laid by a trespasser, but the defendants had continued to use it.

"If a man uses on premises something which he found there, and which itself causes a nuisance by noise, vibration, smell or fumes, he is himself in continuing to bring into existence the noise, vibration, etc., causing a nuisance… In the present case there is sufficient proof of the knowledge of the defendants both of the cause and its probable effect. What is the legal result of the original cause being due to the act of a trespasser? In my opinion, the defendants clearly continued the nuisance for they come clearly within the terms I have mentioned above; they knew the danger: they were able to prevent it and they omitted to prevent it." per Lord Atkin at p.896 & p.899

24.2 An occupier will not usually be liable for a nuisance caused by an independent contractor, unless the work undertaken is an extra-hazardous activity, which would be exceptionally dangerous, whatever precautions were taken. This rule derives from the negligence case of *Biffa Waste Services Ltd v. Maschinenfabrik Ernst Hese GmbH* [2009] QB 725, which was extended to nuisance cases in *Tinseltime Ltd v. Roberts* [2011] EWHC 1199 (TCC), and recently applied in *Lindsay v Berkeley Homes (Capital) plc* [2018] EWHC 2042 (TCC).

25 THE POSSIBLE DEFENDANTS: THE LANDLORD OF THE PERSON WHO IS CREATING THE NUISANCE

25.1 The landlord of a tenant – or the licensor of a licensee – who is causing a nuisance might be a viable defendant in some circumstances. This derives from *Sedleigh-Denfield v. O'Callaghan* [1940].

i. The landlord must be authorizing the nuisance, either expressly or impliedly; and

ii. The tenant must be committing the nuisance in his capacity as a tenant (i.e. he must be doing something he could not otherwise do if he were not a tenant); and

iii. The claimant should not be a tenant of the same landlord, and have rented a property where the nuisance was already taking place.

25.2 **Baxter v. Camden L.B.C. [1999] 2 WLR 566 (CA)**

"As a general rule the tenant as occupier rather than the landlord is liable for nuisance arising out of the state of repair of property or the use which is made of it. But the landlord will be liable if he causes, continues, or authorises the nuisance." per Tuckey LJ at p.575

i. Authorising a tenant to create a nuisance

25.3 The landlord will be liable for a nuisance emanating from let premises if he has expressly or impliedly authorised his tenant to create the nuisance; or if he has participated directly in the commission of the nuisance.

25.4 It is not enough that the landlord had been aware of the nuisance but had taken no steps to prevent it.

25.5 Furthermore, the landlord will not be taken to have authorised the nuisance unless there was a virtual certainty that the letting would result in a nuisance.

25.6 **Maltzy v. Eichholz [1916] 2 KB 308**

"Authority to conduct a business is not an authority to conduct it as to create a nuisance, unless the business cannot be conducted without a nuisance." per Pickford LJ at p.319

25.7 **Smith v. Scott [1973] Ch 314**[3]

"It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance… But this exception has, in the reported cases, been rigidly confined to circumstances in which the nuisance has either been expressly authorised or is certain to result from the purposes for which the property is let... I have used the word "certain," but "certainty" is obviously a very difficult matter to establish. It may be that, as one of the textbooks suggests, the proper test in this connection is "virtual certainty" which is another way of saying a very high degree of probability." per Pennycuick V-C at p.321

25.8 **Southwark London Borough Council v. Tanner [1999] 3 WLR 939 (HL)**

"Once the activities complained of have been found to constitute an actionable nuisance, more than one party may be held legally responsible. The person or persons directly responsible for the activities in question are liable; but so too is anyone who authorised them. Landlords have been held liable for nuisance committed by their tenants on this basis. It is not enough for them to be aware of the nuisance and take no steps to prevent it. They must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property." per Lord Millett at p.956

25.9 Thus, the landlord will NOT be liable for a nuisance if the tenant does something entirely unpredictable. it will not be the landlord's responsibility.

[3] Cited with approval by Lord Neuberger in *Laurence v. Fen Tigers Ltd. (No.2)* [2015] AC 106, para 12.

25.10 **Calvert v. Gardiner [2002] The Times July 22 2002**

It was held that the Bishop of Exeter was not liable for the nuisance caused by the unsociable ringing of church bells authorised by a local vicar, as under Canon Law the Bishop has no power to discipline vicars over such matters and so cannot be held responsible for them.

25.11 **Mowan v. London Borough of Wandsworth [2001] 3 EGCS 133 (CA)**

Miss Abrahart was a certifiably insane clairvoyant. She was a tenant of the council, and lived in the flat above Mrs. Mowan. Mrs. Mowan complained about Miss Abrahart's behaviour which included: threatening to kill Mrs. Mowan;

- regularly blocking the toilet, causing Mrs. Mowan's flat to flood with sewage;
- regularly leaving the taps on to flood Mrs. Mowan's flat;
- jumping up and down on the floor, causing Mrs. Mowan's ceiling to vibrate;
- banging, chanting and moaning during late night seances; and
- claiming to have received psychic messages from Mrs. Mowan's late husband

Mrs. Mowan sued the council for nuisance and negligence, claiming, *inter alia*, that they were breaching her human rights to respect for her private and family life. The Court of Appeal dismissed Mrs. Mowan's claim against the council on the basis of precedent, although they conceded that this was "a deplorable result!"

25.12 The modern principles were laid out by the Supreme Court in *Lawrence v. Fen Tigers Ltd. (No.2)* [2015] AC 106.

Lawrence v. Fen Tigers Ltd. (No.2) [2015] AC 106

In *Lawrence v. Fen Tigers Ltd. [*2014] AC 822, the Supreme Court held that the operators of a motorcross stadium were liable to local residents for the noise nuisance caused by speedway and motorcycle racing.

In a follow-on case, they considered*, inter alia*, whether the landlords of the operators could also be held liable in nuisance. In holding that the landlords were not liable, Lord Neuberger reiterated and applied the following principles:

1. A landlord would not be liable for nuisance caused by the tenant of a property unless the landlord either could be said to have authorised the nuisance by letting the property in question or had participated directly in the commission of the nuisance.

2. It is not enough that the landlord had been aware of the nuisance but had taken no steps to prevent it.

3. In order to succeed on the basis of authorisation by letting, a claimant would have to show a very high degree of probability that the letting of the property would result in nuisance.

4. Liability on the basis of direct participation in the nuisance was largely a question of fact for the trial judge.

"In the present case, there can be no question of the landlords being liable to the appellants for the nuisance on the ground that it was an inevitable, or nearly certain, consequence of the letting to respondent tenants of their respective demised premises, the stadium and the track. The intended uses of those properties were well known to the landlords at the time of the lettings and those uses have in fact resulted in nuisance, but that is not enough to render the landlords liable in nuisance as a result of the letting. It is clear from what the judge said in his judgment and from the terms of the injunction he granted that those uses could be, and could have been, carried on without causing a nuisance to the appellants. It also appears that, in the past, the use of the stadium and the track may well not have given rise to any nuisance. Accordingly, the landlords cannot be liable in nuisance as a result of having let the stadium and track to the respondents." per Lord Neuberger at para 15[4]

[4] This case was recently followed in *Fouladi v. El Karrami* ([2018] EWHC 3501 (Ch). See para 26.6 below.

ii. Some quirky cases

25.13 Despite the problems in fixing a landlord with liability, there have been some quirky cases where such a claim has succeeded.

25.14 **Ribee v. Norrie [2001] PIQR 8 (CA)**

Michael Norrie owned the house next to Margaret Ribee. He converted his house into a hostel comprising several bedsits and a communal sitting room and let it out. He did not live there himself, and one night a fire broke out in the sitting room, probably caused by a discarded cigarette. Smoke from the fire entered Mrs. Ribee's house and caused her personal injury. (She might have died have she not been awoken by her 'heroic' spaniel!)

In an action for nuisance, Norrie argued that he could not be held liable since he was the landlord, not the occupier. However, the court held that in the circumstances he was the occupier of the sitting room, and so was liable.

"I am in no doubt at all that Mr. Norrie was the occupier of the sitting room/dining room set aside for the communal use of the tenants or occupants of the separate bedrooms within the hostel. He retained exclusive possession of the common parts, and exercised his right to enter upon them... Mr. Norrie had full control over that area. He could have laid down rules and regulations preventing smoking in that area." per Ward LJ at para 20

25.15 **Cocking v. Eacott and Waring [2016] EWCA Civ 140**

Brynley and Diane Cocking lived next door to Kim Eacott in a house owned by Kim's mother, Angela Waring. Kim permitted her dog to bark excessively. The Court of Appeal held that both Ms. Eacott and her mother were liable, even though the mother did not live at the address or charge her adult daughter any rent. Once she knew of the nuisance, she could easily have taken steps to abate it.

"In my judgment, Mrs. Waring was, in the requisite sense, both in possession and control of the property throughout her daughter's residence there, and the judge was therefore right to hold her liable for the nuisance as he did. The judge did indeed decide that Mrs. Waring had been able to abate the nuisance but chose to do nothing "notwithstanding her daughter's unreliability". He found that the nuisance could easily have been abated "by removal of the dog or the occupier both of which were easily achievable" by Mrs. Waring." per Vos LJ at para 28

iii. Committing the nuisance in the capacity of being a tenant

25.16 Apart from the other issues, a local authority cannot be held liable in nuisance for failing to prevent council tenants or members of their household from committing criminal acts of harassment against nearby property owners, UNLESS those tenants are using the council land itself as a base for their acts of nuisance. Two cases illustrate either side of this rule.

25.17 **Hussain v. Lancaster City Council (1999) 2 WLR 1142 (CA)**

The council were held not to be liable for nuisance when their tenants subjected a neighbour to severe racial harassment by shouting threats and racist abuse outside his shop.

25.18 **Lippiatt v. South Gloucestershire Council (1999) 3 WLR 137 (CA)**

The plaintiffs, tenant farmers of about 480 acres from the Duke of Beaufort of land on either side of the A46 between Bath and Stroud, claimed that a strip of land of about 300 yards on the eastern side of the road which was owned by the council was occupied by travellers in considerable numbers in caravans from October 1991 until their eviction in June 1994. The travellers frequently trespassed on the plaintiffs' land, obstructed access to their adjacent field, dumped rubbish and left excrement on it, tethered goats, ponies and horses, stole timber, gates and fences, damaged the stone wall at its edge, permitted their dogs to chase the plaintiffs' sheep and acted belligerently towards the plaintiffs, their families, employees and neighbours and assaulted them. These acts damaged crops and made them unfit for consumption.

The trial judge struck out the claim against the council on the basis that it had no prospect of success because of the decision in *Hussain v. Lancaster City Council*. However, the Court of Appeal distinguished *Hussain v. Lancaster City Council* on its facts. In *Hussain v. Lancaster City Council*, the tenants' actions against the neighbours had not been related to their use of the council's land.

Here, however, the council had allowed the travellers to congregate on the land and to use it as a base for the unlawful activities. (The council even provided facilities for them.) There was nothing that precluded a court from holding that an occupier of land might be held liable for a nuisance which consisted of a continuing state of affairs existing on his land where the nuisance manifested itself in the form of repeated acts on the plaintiff's land, and those acts were, to the knowledge of the occupier, committed by persons based on his land and they interfered with the plaintiff's use and enjoyment of his land.[5]

25.19 **Octavia Hill Housing Trust v. Brumby [2010] EWHC 1793**

Terri Brumby lives in a basement flat in London as an assured tenant of the Housing Trust. There is a paved area outside her window (owned by the Trust), She frequently complained about the noise (and other anti-social behavior) caused by the visitors of other tenants as they stood in the paved area, The Trust could easily have prevented them from doing so by fencing it off, but did not do so.

When she sued the Trust for permitting the nuisance, the Trust attempted to have the action struck out, but the court held that there was at least an answerable case to bring this under the same principles as *Lippiatt v. South Gloucestershire Council.*

iv. Liability towards one's own tenants: *Caveat Lessee*

25.20 A landlord will not be liable to his own tenant if he lets to him a property where there is an existing nuisance of which the tenant should have been aware at the time of taking the lease. The principle is *'caveat lessee'*. This applies even if the existing nuisance is caused by another tenant of the same landlord. However, in that case, the victim of the nuisance could sue the other tenant. It is no defence to say that you were there first!

25.21 **Carstairs v. Taylor (1871) LR 6 Ex 217**

"Now, I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently." per Martin B. at p.222

25.22 **Erskine v. Adeane (1873) LR 8 CH 756**

"A tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is caveat emptor, so in the case of taking the lease of property the rule is caveat lessee; he must take the property as he finds it." per Mellish LJ at p.761

25.23 **Cheater v Cater [1918] 1 KB 247 (CA)**

A landlord let a farm to a tenant, retaining the adjoining premises on which was a shrubbery containing yew trees. The branches of the yew trees overhung the farm and were within the reach of the tenant's cattle and horses. The yew trees overhung the land to the same extent as at the beginning of the tenancy.

The tenant's mare ate the yew trees and died. It was held that this was not an actionable nuisance and that the landlord was not liable for the loss of the mare.

"The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is caveat emptor, so in the case of taking the lease of property the rule is caveat lessee; he must take the property as he finds it. I never heard that a landlord warranted that the sheep should not eat his yew trees."

per Pickford LJ at p. 252

[5] *Lippiatt v. South Gloucestershire Council* was followed by the High Court in the similar case of *Winch v. Mid Bedfordshire District Council* (22.7.2002)

25.24 **Kiddle v. City Business Properties Ltd. [1942] 1 KB 269**

"[The plaintiff] takes the property as he finds it and must put up with the consequences. It is not to be supposed that the landlord is going to alter the construction, unless he consents to do so. He would say to his intending tenant: 'You must take it as it is or not at all.'" per Goddard LJ at p.274

25.25 **Jackson v. JH Watson Property Investment Ltd. [2008] EWHC 14**

David Jackson leased a flat in a converted Victorian mansion in Liverpool on a 125-year lease from Oastdren Developments Ltd.. At the time he leased it, there was a problem with water getting into the flat due the defective laying of the concrete to the adjoining light wells during the conversion. Oastdren assigned their rights to Watson, and Jackson sued Watson in nuisance for the water damage to his flat. It was held that as Watson had the same rights as Oastdren, they had the same defence of *caveat lessee* which would have been available to Oastdren. The tenant had taken the demised premises as they were, and could not complain about a pre-existing defect either to his original landlord, or to his new one.

"The doctrine does not depend on fictions, such as the ability of the tenant to inspect the property before taking the lease. It is simply a consequence of the general rule of English law which accords autonomy to contracting parties. In the absence of statutory intervention, the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order between themselves as they see fit. The principle applies whether the complaint relates to the state and condition of the demised premises themselves or, as in the cases cited, of other parts of the building in which the demised premises are located." per John Behrens HHJ at para 46[6]

26 AN UNREASONABLE INTERFERENCE WITH THE ENJOYMENT OF LAND

26.1 Numerous things may interfere with someone's enjoyment of their land. The list is not closed, but examples from the cases include:

- Noise
- Smells
- Smoke
- Vibrations
- Dust
- Smut
- Water
- Sewage
- Electrical Interference
- Natural Encroachments (such as tree roots)
- Perambulating Prostitutes

i. Noise: the racing stadium cases

26.2 **Tetley v. Chitty [1986] 1 All ER 663**

In August 1980, Medway Borough Council granted permission to Medway Kart Club to develop a go-kart track on council land. In January 1981, it granted a seven-year lease to the club for the express purpose of using the land as a go-kart track. Three residents of Rochester brought an action against, *inter alia*, the council claiming damages for noise nuisance (like a "chain saw" or "a bee inside a jar").

HELD: The council was liable, as the noise generated by the go-karting activities was an ordinary and necessary consequence of the operation of go-karts on their land. The plaintiffs were not only entitled to damages, but also to an injunction restraining the council from permitting the continuation of go-karting on the land.

A similar decision was reached in *Watson v. Croft Promosport Ltd.* [2009] EWCA Civ 15, in relation to a motor-racing circuit.

[6] See also *Baxter v. Camden London Borough Council (No.2)* [1999]

26.3 **Lawrence v. Fen Tigers Ltd. [2014] AC 822 (Supreme Court, England)**

In 1975, the defendant built a stadium for use for various motor sports, including speedway racing and stock car racing. In 1992 he started to use agricultural land to the rear of the stadium as a motocross track. The planning permissions he got for these activities placed limits on the frequency and times of activities at the stadium and track but did not place any conditions on the level of noise emitted during those activities.

In 2006, the claimants, Katherine Lawrence and Raymond Shields, bought a house which was situated close to the stadium and the track. Following their complaints about the noise generated by motor sports at the stadium and the track, works were carried out to reduce it. However, the claimants found even the reduced noise unacceptable, and sued for an injunction.

The Supreme Court held that despite the planning permission having been granted, this was still an actionable nuisance. In determining whether a particular activity caused a nuisance by noise, the court had to assess the level of noise which, objectively, a normal person would find it reasonable to have to put up with, given the established pattern of uses, or character, of the locality in which the activity concerned was carried out. The levels in this case were objectively unreasonable and would have to stop.

"The fact that it is not open to a neighbouring claimant to object to the defendant's activities simply because they emit noise does not mean that the defendant is free to carry on those activities in any way he wishes. The claimant is entitled to expect the defendant to take all reasonable steps to ensure that the noise is kept to a reasonable minimum." per Lord Neuberger at para 76

ii. Noise: the upstairs neighbours cases

26.4 **Sampson v. Hodgson-Pressinger [1981] 3 All ER 710 (CA)**

The owners of an upstairs flat had an outdoor terrace on the flat roof of their downstairs neighbours' living room. Because the tiles had been improperly laid, the downstairs tenants could hear both the feet and the conversations of their neighbours when they were using the terrace.

HELD: This was a nuisance for which damages would be granted.

26.5 **Stannard v. Charles Pitcher Ltd. (2003) Env LR 10**

The claimant complained when his upstairs neighbours carried out alterations to their flat such that all the floors, which had been carpeted, were now covered with either marble or ceramic tiles, and the kitchen and bathroom, which had been above the claimant's kitchen and bathroom, were now above his living room and bedroom. He described the resultant noise in his flat as more than he could bear.

HELD: This was an actionable nuisance for which an injunction would be granted.

26.6 **Fouladi v. Darout Ltd., El Karrami and St Mary Abbots Court Ltd. [2018] EWHC 3501 (Ch)**

The El Karramis leased a flat in an exclusive mansion block in Kensington, where the flats are typically worth £2.6 million. Before moving in they arranged – through their family company which owns the flat – to have it renovated, which involved removing partition walls and laying wooden flooring which was to be left uncarpeted (which was in violation of their lease). They then moved in with their lively young family.

Before the renovations, the downstairs neighbours – the Fouladis – had heard no noise from the flat above. Since the renovations, they claimed they were constantly disturbed by noises from the boiler, the fridge, taps, the fireplace (!), dishes being washed, 'angry breathing' and, most especially, the children running about: "They used it like a playground, kids running and dropping things for seven-hours non-stop." The El Karramis also allegedly had late night parties, which involved excessive noise, including drums and undulations.

The county court judge, HHJ Parfitt, thought that the complaints were exaggerated and obsessive, and he did not accept large parts of the claimant's evidence. However, he accepted that the disturbances were a real and unreasonable interference with Miss Faloudi's home life. He issued an injunction for remedial works to be done in the flat; and a compensation order of £107,340, rising by £40 per day until the work was completed.

The defendants appealed to the High Court on several grounds, including that the judge erred in his findings of fact. (n.b. It is very unusual for an appellate court to question the findings of fact by the first instance judge.) However, given that the judge had clearly filtered out the claims he did not believe, it could not be said that he had not taken into full account the exaggerations and inconsistencies in the evidence, and so his decision as to which disturbances did amount to actionable nuisances was unassailable.

"24. The first part of Ground 1 contends that the judge was wrong to accept any part of what the Claimant and Mrs Fouladi had said in evidence and therefore wrong to make his findings in paragraphs [182]-[185] of his judgment. In presenting his argument on this point, Mr Wignall took me to the judge's own judgment and emphasised all of the negative points about the evidence of the Claimant and Mrs Fouladi which the judge himself made. That served to demonstrate that it could not be said that the judge had left those matters out of account. Given that he took them into account and explained why, and the extent to which, he was doing so, the assessment of those matters was for the trial judge. It is quite impossible for an appeal court to form any opinion of its own on those matters particularly where what the appeal court is asked to consider is the same material as the judge fully considered when he made his assessment.

"25. If I apply the relevant principles as to an appeal against a trial judge's findings of fact based on the assessment of witnesses, this part of Ground 1 can be seen to be completely unsustainable. The judge made no error of law. His assessment was based on the evidence before him so that he had evidence to support his finding. He considered all of the relevant evidence and his decision is fully explained and justified.

"26. In fact, it is possible to go further in this case. This is not a case where an appeal court suspects that something might have gone wrong but yet, as a matter of principle does not interfere with the findings of the trial judge. In this case, the exercise carried out by the trial judge appears to have been impeccable." per Morgan J

Compare *Faidi v. Elliott Corporation Ltd.* (2012) below at para 28.8, where a similar claim failed.

iii. Smells

26.7 **Halsey v. Esso Petroleum Co. Ltd. [1961] 1 WLR 685**

The plaintiffs occupied a house in a residential district. In premises adjoining the plaintiff's house, the defendant carried on an oil distribution depot. The plaintiff complained of:- (i) emission of acid smuts from the defendant's chimney which damaged laundry hung out in the plaintiff's garden and also damaged the plaintiff's car parked on the road; (ii) the smell of a nauseating nature caused by heating fuel oil; (iii) noise made by boilers at night which caused the house to vibrate; (iv) noise made by tankers arriving and leaving during the night shift, recently introduced. The action was brought in both private and public nuisance.

HELD: (i) Damage done to clothes was a private nuisance; (ii) Damage done to car was special damage caused by a public nuisance; (iii) The smells were a private nuisance, even though there was no injury to health. There was no right of prescription because it was a recent phenomenon; (iv) the noise of the tankers in the depot was a private nuisance; (v) the noise of the tankers on the road was both a private and a public nuisance.

26.8 **Bone v. Seale [1975] 1 WLR 797 (CA)**

The plaintiffs owned and occupied properties adjacent to the defendants' pig farm. They brought an action for an injunction restraining him from causing nuisance by smell from the farm, and damages. The nuisance which had existed for about 12 years caused no diminution in the value of the properties. HELD: There was a nuisance, which justified an injunction and damages. The trial judge had awarded damages at £6,324.66 to each plaintiff, but this was reduced on appeal to £1,000 each.

26.9 **Fawcett v. Phoenix Inns Ltd. [2003] EWCA Civ 128**

Smells were not the only problem for the Fawcett family when the neighbouring hotel regularly emptied the sewage from two bathrooms and the gents' toilets into their cellar.

26.10 **Barr v. Biffa Waste Services [2013] QB 455 (CA)**

The stench from a waste-tipping site was held to be an actionable nuisance, even though the tip operators had a permit.

iv. Vibrations

26.11 **Sturges v. Bridgman [1879] 11 Ch D 852**

The defendant, a confectioner and baker in Wigmore Street, used a pestle and mortar for some twenty years on his premises to make sweets. The plaintiff, a doctor, built consulting rooms in his garden next to the confectioner's premises. Noises and vibrations from the confectionery disturbed the doctor, and he sued for nuisance. HELD: This was a nuisance. Although a defendant could have built up a prescriptive right to create a nuisance, in this case the nuisance only arose when the doctor built his consulting room.

v. Natural encroachments

26.12 Natural encroachments include things like over-hanging branches, tree roots, soil erosion etc. As these are often not the fault – nor even under the control – of the defendant, the courts in modern cases have tended to be more sympathetic towards the defendant than in other cases, sometimes requiring the claimant to rectify the problem if he wants it sorting.

26.13 **Lemmon v. Webb [1895] AC 1 (HL)**

Thomas Warne Lemmon and Walter Webb were adjoining landowners. On Lemmon's land near the boundary were several large old trees, branches of which had overhung Webb's land for more than twenty years. Without giving notice to Lemmon and without trespassing on his land, Webb cut off the branches to the boundary line. Lemmon sued Webb on the basis that he had no right to cut his branches without giving notice. The trial judge awarded £5 damages against Webb. This decision was reversed by the Court of Appeal.

HELD: The House of Lords affirmed the decision of the Court of Appeal. The branches were a nuisance, and the owner of the land they overhung was entitled to remove them without giving notice.

26.14 **Davey v. Harrow Corp. [1958] 1 QB 60 (CA)**

Arthur Davey's house in Pinner was damaged by the penetration of roots which came from elm trees on the adjoining land, the property of the defendants.

HELD: Applying *Lemmon v. Webb* (1894), the defendants were liable for nuisance. No distinction was to be drawn between trees that were planted and those that were self-sown, and it was no defence to say that damage was caused by natural growth.[7]

26.15 It used to be considered that a landowner was under no duty himself to take positive steps to abate a natural private nuisance. This 'immunity' was rejected by the Privy Council in *Goldman v. Hargrave* (1967).

26.16 **Goldman v. Hargrave [1967] 1 AC 645 (Privy Council: Australia)**

A tall redgum tree on the defendant's land was struck by lightning and began to burn. The defendant had the tree cut down, but then made no attempt to extinguish the fire. The fire spread onto the plaintiff's land and caused damage. The Privy Council held that the defendant had a duty to take action to prevent the foreseeable risk of the fire spreading and was therefore liable.

"It is only in comparatively recent times that the law has recognised an occupier's duty as one of a more positive character than merely to abstain from creating, or adding to, a source of danger or annoyance." per Lord Wilberforce at p.657

[7] There have been many cases of root encroachment being held to be a nuisance. See, for example:
Bybrook Barn Centre Ltd. v. Kent County Council [2001] Env LR 30 (CA)
Delaware Mansions Ltd. v City of Westminster [2001] 3 WLR 1007 (HL)
LE Jones (Insurance Brokers) Ltd. v. Portsmouth CC [2003] 1 WLR 427 (CA)

26.17 **Leakey v. National Trust for Places of Historic Interest or Natural Beauty [1980] QB 485 (CA)**

The houses of the plaintiffs had been built at the foot of a large mound on the defendants' land. Over the years, soil and rubble had fallen from the bank of the mound onto the plaintiffs' land, due to natural weathering. From at least 1968 the defendants knew that the instability of their land was a threat to the plaintiffs' properties. After a very dry summer followed by a wet autumn in 1976, a large crack appeared in the mound above the house of one of the plaintiffs. They drew the defendants' attention to this, but the defendants replied that they had no responsibility for any damage caused by a natural movement of the land. A few weeks later, when earth and tree stumps started to fall on the plaintiffs' property, they brought an action in nuisance claiming orders for abatement of the nuisance and damages.

HELD: Following *Goldman v. Hargrave*, the plaintiffs were entitled to abatement and damages. The Court of Appeal usefully examined the subject of what it is reasonable to expect a defendant to do.

The following propositions were made:

i) The occupier of land owes a general duty of care to a neighbouring occupier in relation to a hazard occurring on his land, whether such a hazard was natural or man-made.

ii) The duty is to take such steps as are reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour or his property of which the occupier knows or ought to know.

iii) The circumstances include his knowledge of the hazard; the extent of the risk; the practicability of preventing or minimising the foreseeable injury or damage; the time available for doing so; the probably cost of the work involved; and the relative financial and other resources of the parties.

In the case itself, it being accepted by the defendants that the quantity and cost of the work required had not gone beyond their financial or other capacities or been greater than necessary to deal with the actual damage to the plaintiffs, the plaintiffs were entitled to judgment.

26.18 A natural encroachment does not have to cause actual physical damage to the neighbouring property to be an actionable nuisance, but it is not sufficient for it simply to reduce the market value of the property: it has to interfere with the 'amenity value' of the property. This can include the trouble and expense of having to abate it.

26.19 **Williams v. Network Rail Infrastructure Ltd. [2019] QB 601 (CA)**

The claimants owned bungalows whose rear walls abutted an access path owned by the defendant. The path led to an embankment, also owned by the defendant, on which a large stand of Japanese knotweed had been present for at least 50 years. Japanese knotweed was a pernicious weed which had the potential to spread underground through its roots or rhizomes (underground stems).

The claimants alleged that the knotweed had encroached upon their land (along the foundations) and caused damage. They brought a claim against the defendant seeking damages in nuisance, on the basis that (i) encroachment of the knotweed onto their land amounted to an actionable nuisance without the need for them to prove any physical damage to their properties; or (ii), alternatively, the presence of the knotweed on the defendant's land amounted to an actionable nuisance because it interfered with the quiet enjoyment or amenity value of their properties by affecting their ability to sell their properties at a proper market value.

The recorder rejected the claim based on encroachment, finding that although knotweed or its rhizomes had encroached onto the claimants' land from the defendant's land with the defendant's actual or constructive knowledge it had not caused any physical damage; but gave judgment for the claimants on the ground that the presence of knotweed on the defendant's land had diminished the value of the claimants' properties.

On the defendant's appeal—

Held (1) that the amenity of a property, for the purposes of the tort of private nuisance, did not include the right to realise or otherwise deploy the value of the property in the financial interests of the owner, and so the presence of Japanese knotweed on land did not constitute an actionable nuisance simply because it diminished the market value of a neighbouring owner's land.

But (2), dismissing the appeal, that the mere presence of Japanese knotweed, or its rhizomes, on land interfered with the amenity value of that land without proof of further damage, because it imposed an immediate burden on the owner of the land in terms of an increased difficulty in the ability to develop and in the cost of developing the land, should the owner wish to do so.

vi. Sex establishments

26.20 Several successful cases have involved the nuisance value of the sight of sex shops and their clientele. This is odd as technically this is a claim for a view (or 'prospect') which would not normally give rise to a cause of action, though the cases may have been decided on the basis that the plaintiff's actions devalued the property.

26.21 **Thompson-Schwab v. Costaki [1956] 1 WLR 335**

The plaintiff owned a house in a high-class residential street. His neighbour ran a brothel next door. HELD: An injunction would be granted.

"The plaintiffs have shown, in my opinion, a sufficient prima facie case to the effect that the activities being conducted at No.12 Chesterfield Street are not only open, but they are notorious, and such as force themselves upon the sense of sight at least of the residents in No.13. The perambulations of the prostitutes and of their customers is something which is obvious, which is blatant, and which, as I think, the first plaintiff has shown prima facie to constitute not a mere hurt of his sensibilities as a fastidious man, but so as to constitute a sensible interference with the comfortable and convenient enjoyment of his residence, where live with him his wife, son and servants."

per Lord Evershed M.R. at p.339

26.22 **Laws v. Florinplace [1981] 1 All ER 659**

A sex-shop in a residential area was held to be a nuisance, partly due to the large illuminated sign which announced 'Victoria Sex Centre and Cinema Club,' partly due to the other signs in the window, and partly due to the likely clientele that would be attracted. (The evidence was that 80% of people who use sex-shops are perfectly normal, well-balanced businessmen, but it was the other 20% the court was concerned about!)

The court seemed to accept the argument of the plaintiff that there does not need to be a physical emanation of a damaging kind from the defendants' premises for there to be a nuisance. On this issue, see Lords Goff and Lloyd in *Hunter v. Canary Wharf Ltd.*

vii. Dust

26.23 **Andreae v. Selfridge [1938] Ch 1 (CA)**

The plaintiff owned a small hotel off Oxford Street. As a result of operations to rebuild Selfridges Department Store, the hotel was covered with dust and business slumped. HELD: The defendants were partly liable for the financial losses suffered by the plaintiff.

26.24 **Hunter v. London Docklands Development Corporation [1997] 2 WLR 684 (HL)**

This case was heard at the same time as *Hunter v. Canary Wharf.*

In this second action, 513 of the plaintiffs claimed damages for negligence and nuisance in respect of deposits of dust on their properties caused by the construction of a link road. They could not open their windows for fear of the layers of dust that would settle on their furniture, nor hang their washing out in the garden. It was not disputed that activities which cause dust can constitute an actionable nuisance. The only contentious issue was who was entitled to sue.

27 INTERFERENCE WHICH DOES NOT USUALLY CONSTITUTE AN ACTIONABLE NUISANCE

i. Interference with television signals

27.1 It seems that interference with television signals will **not** normally give rise to a claim in private nuisance.

27.2 **Bridlington Relay Ltd. v. Yorkshire Electricity Board [1965] Ch 436**

The plaintiff company, who carried on the business of relaying television signals, erected a mast on its own land for that purpose in 1962. In 1963, the local electricity board commenced to erect an overhead power line, situating two of its pylons within 250 yards of the mast. The plaintiffs sought an injunction to prevent the defendant from operating its power line so as to interfere with the reception of the television transmission at the mast. HELD: Interference with a recreational amenity, such as television viewing, would not normally constitute a sufficient interference with the ordinary beneficial enjoyment as to amount to a legal nuisance. There might be exceptional cases, but this was not one of them.

"I do not think that it can at present be said that the ability to receive television free from occasional, even if recurrent and severe, electrical interference is so important a part of an ordinary householder's enjoyment of his property that such interference should be regarded as a legal nuisance, particularly, perhaps, if such interference affects only one of the available alternative programmes."

per Buckley J. at p.447

Buckley J. did however concede that one day the television could become *"so important a part of an ordinary householder's enjoyment of his property that such interference should be regarded as a legal nuisance."* per Buckley J. at p.447

27.3 **Hunter & Others v. Canary Wharf Ltd. [1997] AC 655 (HL)**

It was held that the interference with the television signal of the claimants was not an actionable nuisance. However, it is not clear that the House of Lords altogether rejected the possibility that such disturbance could ever be an actionable nuisance. Lord Goff distinguished *Bridlington Relay Ltd. v. Yorkshire Electricity Board* [1965] on the basis that there was in that case an emanation of electrical signals interfering with the television reception, whereas here the nuisance was not caused by an emanation but simply by the presence of a building. However, he did also point out that with modern technology, the loss of a normal television signal was not such a hardship.

"That a building may have such an effect has to be accepted. If a large building is proposed in a neighbouring area, it will usually be open to local people to raise the possibility of television interference with the local planning authority at the stage of the application for planning permission. It has, however, to be recognised that the problem may well not be appreciated until after the building is built, when it will be too late for any such representations to be made. Moreover, in the present case, in which the Secretary of State had designated the relevant area as an Enterprise Zone with the effect that planning permission was deemed to have been granted for any form of development, no application for permission had to be made.

"But in any event, with the rapid spread of the availability of cable television in urban areas, interference of this kind is likely to become less and less important; and it should not be forgotten that satellite television is also available. In the present case, the problem was solved in the end by the introduction by the B.B.C. of a new relay station, though not until after a substantial lapse of time."

per Lord Goff of Chieveley

Some of the other Lords were more direct: *"Interference with television reception is not capable of constituting an actionable private nuisance."* per Lord Lloyd

n.b. In *Network Rail Infrastructure Limited (Railtrack plc) v. CJ Morris (Soundstar Studio)* [2004] EWCA Civ 172, it was held that electromagnetic interference to the claimant's commercial sound system was capable of amounting to a private nuisance. The case was lost on other grounds. (See below)

ii. Right to a view (sometimes called ‘a prospect’)

27.4 **Attorney-General v. Doughty (1752) 2 Ves.Sen.453**

There is generally no right to a view, though note cases such as *Thompson-Schwab v. Costaki* (1956).

iii. Right to air-flow

27.5 **Bland v. Mosely (1587) 9 Co. Rep. 58a**

In the absence of an easement, there is no right to a flow of air across your land.

iv. Right to light

27.6 **Dalton v. Angus (1881) 6 App.Cas.740 (HL)**

In the absence of an easement (called ‘ancient lights’) there is no right to natural light.

27.7 **Tampling v. Jones (1865) 20 CBNS 166**

"Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within 20 years after the opening of the window, obstruct the light which would otherwise reach them. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest; and if by so doing he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint." per Lord Carnworth at pp.185-186

v. Overlooking other people’s property

27.8 **Fearn v. The Board of Trustees of the Tate Gallery [2020] EWCA Civ 104**

There is no right not be overlooked by people in neighbouring property.

In 2012, a striking modern development of flats, known as Neo Bankside, was completed on the South Bank of the Thames, directly opposite the Tate Modern. In 2016, a new extension to the Tate, known as the Blavatnik Building opened. This included a viewing gallery, from which the public could see into some of the flats.

Up to 600,000 people a year now visit the viewing gallery and until April 2018, it was a thing to photograph the interiors of the flats and post the pictures up on Instagram, reaching an audience of about 38,600 people. The Tate’s security guards were then instructed to stop people taking photographs of the flats, but nothing was done to prevent the public from seeing into them, except for a notice asking the public to respect the privacy of the residents.

The affected residents brought a claim alleging that the use of the viewing gallery unreasonably interfered with their enjoyment of the flats, so as to be an actionable nuisance. They also claimed that their Article 8 rights to respect for their private and family lives were being infringed and that therefore, insofar as the Tate is a public authority, there was a breach of s.6 of the Human Rights Act 1998.

The trial judge (Mann J.) held that there was a material intrusion into the privacy of the residents from those people peering in from the viewing platform, more than would be the case if the flats were simply overlooked by other windows, not designed for viewing.

However, on the issue of the Article 8 rights, he held that the Tate was not a public authority within the HRA 1998, and so this claim failed automatically.

On the nuisance point, he held that the matter turned on whether invasion of privacy could be an actionable nuisance. He held that the tort of nuisance was capable of protecting privacy rights, at least in a domestic home, but that, in the instant case, it did not do so. Several aspects of the case were significant in this regard:

LOCALITY

The locality is a part of urban South London used for a mixture of residential, cultural, tourist and commercial purposes but the significant factor was that it is an inner-city urban environment, with a significant amount of tourist activity. He said that an occupier in that environment can expect rather less privacy than perhaps a rural occupier might, and that anyone who lives in an inner city can expect to live quite cheek by jowl with neighbours.

UNUSUAL SENSITIVITY

In building the flats, and the claimants as successors in title who chose to buy the flats, had created or submitted themselves to a sensitivity to privacy which was greater than would have been the case of a less glassed design. There was thus was a parallel with nuisance cases in which the claim had failed because the claimant's user which had been adversely affected by the claimant's activity was a particularly sensitive one and that an ordinary use would not have been adversely affected.

EXPOSING THEMSELVES TO NUISANCE

By incorporating the ‘winter gardens’ (indoor balconies) into the living accommodation, the owners and occupiers of the flats had created their own additional sensitivity to the inward gaze. The claimants were, therefore, occupying a particularly sensitive property which they were operating in a way which had increased the sensitivity.

REASONABLE REMEDIAL STEPS THAT COULD HAVE BEEN TAKEN (GIVE AND TAKE)

There were remedial steps that the claimants could reasonably be expected to have taken on the basis of the "give and take" expected of owners in this context. He mentioned: (1) lowering the solar blinds; (2) installing privacy film; (3) installing net curtains; (4) putting some medium or taller plants in the winter gardens.

The Court of Appeal dismissed the appeal from the residents, but largely disagreed with the reasoning of Mann J.

The Court of Appeal held that this could not be a case of private nuisance, on the simple ground that the overwhelming weight of judicial authority is that mere overlooking is not capable of giving rise to a cause of action in private nuisance. (Para 74).

The trial judge’s analysis was misconceived on the topics of the sensitivity of the claimants (which was not unusually high); of their self-exposure (which was irrelevant); and of their need to take remedial steps (which was not their duty). Had this been a potential nuisance, it would not have been defeated by any of these supposed defences.

The trial judge was also wrong in his analysis of Article 8, which the Court of Appeal said could not apply here, *inter alia* because there was no Strasbourg precedent for such a cause of action: to engage Article 8 here would run contrary to the mirror principle, that the courts should keep pace with, but not go beyond, Strasbourg (Para 90)..

Sir Terence Etherton MR at para 81 summarised the policy reasons why the law of nuisance should not be extended to include overlooking.

“Unlike such annoyances as noise, dirt, fumes, noxious smells and vibrations emanating from neighbouring land, it would be difficult, in the case of overlooking, to apply the objective test in nuisance for determining whether there has been a material interference with the amenity value of the affected land. While the viewing of the claimants' land by thousands of people from the Tate's viewing gallery may be thought to be a clear case of nuisance at one end of the spectrum, overlooking on a much smaller scale may be just as objectively annoying to owners and occupiers of overlooked properties. The construction of a balcony overlooking a neighbour's garden which results in a complete or substantial lack of privacy for all or part of the garden, with particular significance in the summer months, and which may even diminish the marketability or value of the overlooked property, would appear to satisfy the objective test. There would also be a question whether, in such a case, it makes any difference if there was more than one balcony or more than one family using the balcony or balconies. It is difficult to envisage any clear legal guidance as to where the line would be drawn between what is legal and what is not, depending on the number of people and frequency of overlooking. It is well known that overlooking is frequently a ground of objection to planning applications: any recognition that the cause of action in nuisance includes overlooking raises the prospect of claims in nuisance when such a planning objection has been rejected.”

28 THE INTERFERENCE MUST BE UNREASONABLE

28.1 **Cambridge Water Co. v. Eastern Counties Leather plc [1994] 2 AC 264 (HL)**

"Liability [for nuisance] has been kept under control by the principle of reasonable user - the principle of give and take as between neighbouring occupiers of land, under which those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action." per Lord Goff at p.299

28.2 Various factors may influence a court in deciding whether the defendant's behaviour was reasonable in all the circumstances. There may be some disturbances a disgruntled neighbour is just expected to tolerate.

28.3 **Faidi v. Elliott Corporation Ltd. (2012) Unreported (CA)**

"Not all neighbous are from Hell. They may simply occupy the Land of Bigotry. There may be no escape from Hell, but the boundaries of bigotry can, with tact, be changed. Give and take is often better than all or nothing." per Ward LJ

i. Normal behaviour

28.4 It is not ''unreasonable' to carry on 'normal' activities on premises.

28.5 **Walter v. Selfe [1851] 20 LJ Ch. 433**

Walter was, and had been for some years previously to 1850, the owner of a house, with a garden and pleasure-ground attached to it in Surbiton. In 1850, Selfe purchased a piece of land, about an acre in extent, about 100 yards from Walter's house, and began to manufacture bricks from the clay taken from this land by burning.

HELD: This was a nuisance and an injunction would be granted: *"The important point for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions among English people."*
per Sir Knight-Brice V.C. at p.435

28.6 **Lyons v. Wilkins [1899] 1 Ch 255**

"Every annoyance is not a nuisance. The annoyance must be of a serious character and of such a degree as to interfere with the ordinary comforts of life." per Chitty LJ at p.271

28.7 **Baxter v. Camden London Borough Council (No.2) [1999] 3 WLR 939 (HL)**

In 1975 the council converted a Victorian end-of-terrace house in Camden into three one-bedroom flats, one on each floor. There was no statutory requirement in London at that time, or until 1985, to provide sound insulation. In July 1992 the council let the first-floor flat to Yvonne Baxter. Tenants already occupied the other two flats. Because of the poor sound-proofing between the flats, the plaintiff could hear the noise generated by the day-to-day living of her neighbours, including: **"Normal conversation, singing, arguments, the television, snoring, coughing, bringing up of phlegm, sneezing, bedsprings, footfalls and creaking floorboards, the pull-cord light switch in the bathroom, taps running in the bathroom and kitchen, the toilet being used, the vacuum cleaner and music on the stereo."**

HELD: This was not an actionable nuisance as ordinary use of premises without more was not unreasonable. There was nothing unusual about the way in which these domestic premises were being used. To be a nuisance the use of the premises must be both annoying **and** unusual

"Ordinary use of residential premises without more is not capable of amounting to a nuisance. Ordinary use may only give rise to a nuisance if it is unusual or unreasonable having regard to the purpose for which the premises were constructed."
per Tuckey LJ in the Court of Appeal at [1999] 2 WLR 566 at p.574

"My Lords, I would not wish to be thought indifferent to Miss Baxter's plight. I have the greatest sympathy for her. But the fact remains that she took a flat on the first floor of a house, knowing that the ground and second floors were also occupied as residential flats, and expecting their occupants to live normal lives. That is all that they are doing. She has no cause to complain of their activities, which mirror her own; or of the council for having permitted them by letting the adjoining flats.

"Her real complaint is, and always has been, of the absence of adequate sound insulation. Her complaint, however well founded, cannot be redressed by the law of tort." per Lord Millett at p.95

28.8 **Faidi v. Elliott Corporation Ltd. (2012) Unreported (CA)**

Hameed and Inam Faidi own a flat in Eaton Mansions, Belgravia, which is occupied by their son. In 2010, the flat above theirs was bought for £4.7 million by the Elliott Corporation, which did extensive renovation works on the flat, including laying a £100,000 oak floor and under-floor heating. The Faidis complained that the sound of clicking heels on the wooden floor above them resounded into their flat and that the wooden floors were a violation of the lease, which required all rooms except the kitchen and bathroom to be carpeted.

It was held that it was not a nuisance as the floors met minimum sound-proofing standards, and walking about was a reasonable user of the upstairs flat. Furthermore, as the freeholders had approved the plans, it was not a violation of the lease. The Court of Appeal also took into account the fact that a carpet would compromise the under-floor heating and ruin the look of the flat.

The Faidis were left to pay the legal bill, which came to £140,134. Jackson LJ commented: *"If the parties were driven by concern for the well-being of lawyers, they could have given half that sum to the Solicitors Benevolent Association and then resolved their dispute for a modest fraction of the monies left over."*

n.b. Compare *Fouladi v. Darout Ltd., El Karrami and St Mary Abbots Court Ltd.* ([2018] EWHC 3501 (Ch) where the noise caused by ordinary use of a residential flat was held to be a nuisance. It was accepted by both sides that the nuisance – if any – was the work to the floor which transmitted the noise. Morgan J. queried this analysis (at para 79), but proceeded on the basis that it was correct, as it had not been made the basis of a ground of appeal.

ii. Duration and extent of the nuisance

28.9 It is an obvious proposition that in deciding whether an interference is reasonable or not, one must consider *inter alia* how often it occurs; at what time of day it happens; and how substantial it is.

28.10 **Rapier v. London Tramway Co. [1893] 2 Ch D 588**

The defendants set up a stable for horses which were to draw their trams. As there were 200 of these horses, this resulted in a considerable stench which amounted to a nuisance.

28.11 **Bolton v. Stone [1951] AC 850 (HL)**

Miss Stone was hit by a cricket ball whilst standing on the highway outside her house. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground which was adjacent to the highway. She sued in negligence and nuisance. HELD: It was neither. Only 6-10 cricket balls had been hit out of the cricket field onto a highway during thirty-five years. Although it was foreseeable that this might happen, the House of Lords said the possibility was too remote either to impose a duty of care in negligence or to constitute unreasonable behaviour in nuisance.

28.12 **Tetley v. Chitty [1986] 1 All ER 663**

"You could hear the noise quite clearly in that room as well as in the rest of the house. The noise was distressing. I am normally philosophical but this was all day and every day. I felt powerless to do anything about it except to complain." per Mr. Beggs, second plaintiff at p.666

28.13 **Peires v. Bickerton's Aerodromes Ltd. [2016] EWHC 560 (Ch)**

Lorna Peires lived in a substantial detached house near an aerodrome where helicopter pilots were trained. She accepted that there would be a certain level of noise emanating from the aerodrome, but complained about the frequent, lengthy and unpredictable noise of helicopters landing and taking off during training.

HELD: The activity was unreasonable by virtue of its frequency and length. An injunction was granted to limit it to two fixed day operations of 15 minutes each.

28.14 Even a temporary or one-off situation can create a nuisance if particularly severe, especially if it causes property damage.

28.15 **De Keyser's Royal Hotel Ltd. v. Spicer Brothers Ltd. [1914] 30 TLR 257**

Noisy pile driving at night during temporary building works was held to be a private nuisance.

28.16 **Crown River Cruises Ltd. v. Kimbolton Fireworks Ltd. [1996] 2 Lloyd's Rep. 533**

A spectacular fireworks display was launched on the night of September 16th 1990 as the culmination of the commemoration of the 50th anniversary of the Battle of Britain. The display was mounted on a pontoon on the bow of the tug *Revenge* stationed in the middle of the Thames between Blackfriars and Waterloo bridges. The display lasted between 15-20 minutes, during which burning debris fell onto the plaintiff's barge *Surround* which was moored nearby. This caused a small fire, which was supposedly extinguished by the fire brigade. However, at 5:00 the next morning a serious fire was discovered on both *Surround* and *Suerita*, the barge which was moored next to it. It was clear that these fires were the result of the reflaring of the fire caused by the fireworks display.

The plaintiffs successfully sued the organisers of the fireworks display in both negligence and nuisance. (They also unsuccessfully sued the fire brigade for not putting out the original fire properly!)

On the nuisance issue, Potter J. made the following comment:

"It seems to me that those authorities which have held that a particular type of interference has not amounted to a nuisance by reason of its short duration, have generally been concerned with complaints relating to nuisance, noise, vibration, dust etc. which are to an extent to be regarded as a normal incident of urban living, in respect of which a degree of give and take is to be expected, unless by undue length or repetition they become intolerable.

"Where an activity creates a state of affairs which gives rise to risk of escape of physically dangerous or damaging material, such as water, gas or fire, then the law of nuisance is, and should be, available to give a remedy in respect of that state of affairs, albeit brief in duration.

"In my opinion the holding of a fireworks display in a situation where it is inevitable that for 15-20 minutes debris, some of it hot and burning, will fall upon nearby property of a potentially flammable nature creates a nuisance actionable at the suit of a property owner who suffers damage as a result"
per Potter J. at p.545

iii. Sensitivity of the claimant

28.17 A claimant will not succeed if he is adversely affected by a nuisance which would not affect a normal person.

28.18 **Gaunt v. Finney (1827) 8 Ch App 8**

"A nervous or anxious or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance originating within himself sounds which at other times would have been passively heard and disregarded." per Lord Selbourne

28.19 **Clerk & Lindsell 18th ed. para 19-06**

"A nuisance of this kind, to be actionable, must be such as to be a real interference with the comfort or convenience of living according to the standards of the average man. An interference which alone causes harm to something of abnormal sensitiveness does not of itself constitute a nuisance. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or for pleasure."

28.20 **Robinson v. Kilvert [1889] 41 Ch 88 (CA)**

A landlord let a floor of a building to a tenant as a paper warehouse, retaining the cellar immediately below. The landlord later began to make paper-boxes in the cellar, a process which required hot and dry air. He therefore adapted the boiler to raise the temperature in the cellar, which consequently raised the temperature in the plaintiff's warehouse. The heat dried out the plaintiffs' paper, which made it more brittle and also lighter. As it was sold by weight, this seriously decreased the value of the paper.

HELD: The damage caused to the plaintiff was due to the unusual sensitivity of his brown paper to the heat. The landlord did not know of this at the time he let the premises, and he was not liable in nuisance.

"If a person does what in itself is noxious, or which interferes with the ordinary use and enjoyment of a neighbour's property, it is a nuisance. But no case has been cited where the doing something not of itself noxious has been held to be a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life."

per Cotton LJ at p.94

28.21 On the other hand, a claimant will succeed if, although he is unusually sensitive, the defendant's activities would also affect a normal person.

McKinnon Industries Ltd. v. Walker [1951] 3 D.L.R. 577 (Privy Council: Canada)

The plaintiff grew orchids for sale and complained of the damage caused by the emission of fumes and sulphur dioxide from the defendant's steel factory. The defendant tried to resist an injunction on the basis that the plaintiff was unusually sensitive to the fumes as orchids are particularly difficult to cultivate.

The Privy Council held that the fumes would have damaged any flowers, so the fact that the plaintiff's flowers were orchids was neither here nor there.

28.22 The old common law seems ill-equipped to deal with modern problems, such as electronic interference, where increasing numbers of people suffer from what used to be considered unusual sensitivity.

Network Rail Infrastructure Ltd. (formerly Railtrack plc) v. CJ Morris (t/a Soundstar Studio) [2004] EWCA Civ 172

C.J. Morris opened a recording studio in 1987 in Croydon about 80 metres from the London to Brighton main line railway track. In 1994, Railtrack installed a type of track circuit known as T1 21 near to his studio, which caused interference to his electric guitars, making satisfactory recording impossible. He complained to no avail, and over two years his business collapsed and he lost over £60,000 in profits. Railtrack claimed, *inter alia*, that Morris's use of the property was unusual and extraordinarily sensitive and so the interference with it was not subject to an action in nuisance.

The trial judge disagreed, considering that the case had to be considered in view of the current trends in popular music: *"The use of sensitive electric and electronic equipment is so much a feature of modern life that such use cannot be disregarded. I accept that it may not be thought especially important, but it is certainly an ordinary incident of the enjoyment of property. It is the stuff of many young people's pleasure, and is a major part of modern music making."*

per Mr. Recorder Pulman Q.C.

However, the Court of Appeal stated *obiter* that if they were to follow the old authorities, they would hold that the guitars **were** unusually sensitive equipment which did not attract the protection of the law of negligence. That said, they thought that competing interests in such modern matters as electro-magnetic interference to sound systems was not contemplated by the old common law and might be better dealt with by regulation, such as the European directives of the 1990s by which new electronic equipment is subject to specific standards as to how much interference it causes and how much it can tolerate.

The Court of Appeal actually found for Railtrack on the basis that the loss suffered was not reasonably foreseeable, so the issue of sensitivity was not material.

28.23 Indeed, as it is now clear that damages for loss can only be recovered in nuisance where the loss suffered was **reasonably foreseeable** (discussed below) some judges think the unusual sensitivity issue is now largely redundant.

In the Network Rail case, Buxton LJ made the following comment:

"It is difficult to see any further life in some particular rules of the law of nuisance, such as for instance the concept of 'abnormal sensitiveness' drawn from Robinson v. Kilvert. That rule was developed at a time when liability in nuisance, for damaging a neighbour by use of one's own land, was thought to be strict... The unreasonable results which could flow from that approach were mitigated by a number of rules of thumb; for instance, that an activity that could only injure an exceptionally delicate trade could not be a nuisance at all... It is very difficult not to think that such particular rules are now subsumed under the general view of the law of nuisance expressed in Delaware Mansions."

per Buxton LJ at para 35

iv. Location

28.24 What is a nuisance in one place may not be so in another. Thus, noise and fumes in an industrial area may be considered to be reasonable, whilst the same activities in a residential area would not.

28.25 **Hole v. Barlow (1858) 140 E.R. 1113**

"A swine-style might not be considered a nuisance in Bethnal Green: but it certainly would be so in Grosvenor Square." per Byles J (in argument)

28.26 **Sturges v. Bridgman [1879] 11 Ch D 852**

"What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey."

per Thessiger LJ at p.865

28.27 **Baxter v. Camden London Borough Council (No.2) [1999] 3 WLR 939 (HL)**

"As Bramwell B. remarked in Bamford v. Turnley, it may in one sense be quite reasonable to burn bricks in the vicinity of convenient deposits of clay but unreasonable to inflict the consequences upon the occupants of nearby houses. Likewise, it may be reasonable to have appliances such as a television or washing machine in one's flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour's premises."

per Lord Hoffmann at p.950

v. The effect of planning permission on the character of a location

28.28 The character of a location may change, but the mere granting of planning permission will not amount to a change of character.

28.29 **Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd. [1992] 3 WLR 449**

This was a case of **public nuisance** in which it was alleged that a nuisance was caused by the building of two approach roads to a port, causing a flow of heavy goods vehicles all through the night. Buckley J. made the following general comment:

"It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which prior to the change would have been an actionable nuisance." per Buckley J at p. 460

28.30 **Wheeler v. J.J. Saunders Ltd. [1995] 3 WLR 466 (CA)**

A pig farmer obtained planning permission to build two Trowbridge houses to accommodate 40 pigs 11 metres from the plaintiffs' house. The dreadful smell affected both the plaintiffs and the visitors to their holiday cottages. HELD: The smell was a nuisance against which an injunction would be granted, even though planning permission had been granted for the pig-farm.

"It would in my opinion be a misuse of language to describe what has happened in the present case as a change in the character of a neighbourhood. It is a change and abuse of a very small piece of land, a little over 350 square metres according to the dimensions on the plan, for the benefit of the applicant and to the detriment of the objectors in the quiet enjoyment of their house. It is not a strategic planning decision affected by considerations of public interest. Unless one is prepared to accept that any planning decision authorises any nuisance which must inevitably come from it, the argument that the nuisance was authorised by planning permission in this case must fail. I am not prepared to accept that premise." per Staughton LJ at p.475

28.31 **Watson v. Croft Promosport Ltd. [2009] EWCA Civ 15**

Planning permission was granted to the defendants to run a motor-racing circuit on the site of a former aerodrome in a rural area. Despite this, the court granted an injunction to stop the excessive noise nuisance to the neighbours.

"The defendants submit that the judge erred in law in failing to conclude that the nature and character of the locality had been changed by the grant of planning permission in 1963 and 1998 or the terms of the s.106 Agreement. The relevant change must have arisen from the implementation of those grants and that Agreement, not their mere existence. But the consideration of that implementation must be made in the context, as the claimants submit, that neither the tortious activities of a defendant (Dennis v Ministry of Defence [2003] EWHC 793) nor the intensification of a particular use (Wheeler v Saunders [1996] Ch. 19) can change the essential character of the locality."

per The Chancellor of the High Court at para 35

28.32 **Barr v. Biffa Waste Services [2013] QB 455 (CA)**

The claimants, represented 152 households on the Vicarage Estate in Ware, Hertfordshire, of whom 30 were selected as lead claimants, the first being Derrick Barr. They brought a claim against the defendant, Biffa Waste Services Ltd, alleging that the smell emanating from a landfill site known as the Westmill 2 landfill site, operated by the defendant, constituted a nuisance.

They lived on an estate near a waste-tipping site operated by Biffa. In 2003, a waste management permit had been granted for the tipping of pre-treated waste. Barr later asserted that over a five-year period the local residents had been affected by odour coming from the site, amounting to nuisance.

The judge found that:
(i) the controlling principle was that of "reasonable user";
(ii) because the common law had to be adapted to march in step with European and domestic environmental legislation and the 2003 permit, Biffa's use was deemed to have been reasonable if it complied with the terms of the permit;
(iii) the grant of a permit was strategic in nature and so altered the neighbourhood's character against which reasonableness was to be judged and the permit, by implication, provided a statutory licence for the escape of a certain amount of odour emission such that Biffa's use was deemed reasonable and the claims failed; and
(iv) by imposing a threshold requirement of one odour complaint each day, most of the claims would have failed.

On appeal, it was held that the judge had erred in dismissing the claim of nuisance by extending the existing principles of "reasonable user" and considering that complying with the terms of a permit meant that such use of the site had been reasonable. There was no basis for using a statutory scheme to cut down private law rights and, in any event, the permit did not authorise the emission of such smells.

An activity which was conducted in contravention of planning or environmental control was unlikely to be reasonable, but the converse did not follow. The common law of nuisance had co-existed with statutory controls since the nineteenth century. There was no principle that it should march with a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance, there was no basis, in principle or authority, for using such a statutory scheme to cut down private law rights,

28.33 **Lawrence v. Fen Tigers Ltd. [2014] AC 822 (Supreme Court, England)**

"The grant of planning permission for a particular development does not mean that that development is lawful. All it means is that a bar to the use imposed by planning law, in the public interest, has been removed. Logically, it might be argued, the grant of planning permission for a particular activity in 1985 or 2002 should have no more bearing on a claim that that activity causes a nuisance than the fact that the same activity could have occurred in the 19th century without any permission would have had on a nuisance claim in those days.

"Quite apart from this, it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance, without providing her with compensation, when there is no provision in the planning legislation which suggests such a possibility." per Lord Neuberger at paras 89 and 90

vi. Malice by the defendant

28.34 If the defendant's actions are taken deliberately to annoy his neighbour, they are more likely to be considered as unreasonable.

28.35 Oddly, this rule does not apply where a neighbour is maliciously diverting water from his neighbour's land. This is a *damnum sine injuria*. *Bradford Corporation v. Pickles* (1895) AC 587 (HL).

28.36 **Christie v. Davey [1893] 1 Ch 316**

Mr. H. Fitzer Davey, a wood engraver, lived next door to Mr. J.F. Holder Christie and his musical family in Brixton. Mrs. Christie and her daughter gave piano and violin lessons for about seventeen hours a week, and Master Christie played the violoncello inexpertly as late as eleven o'clock at night. The family also enjoyed musical evenings of singing and playing. Only Mr. Christie was not musical, and, as the judge wryly observed: "perhaps fortunately for himself" was very deaf

Alas, Mr. Davey did not enjoy the constant symphony, and he wrote to Mr. Christie:

"During this week we have been much disturbed by what I at first thought were the howlings of your dog, and, knowing from experience that this sort of thing could not be helped, I put up with the annoyance. But, the noise recurring at a comparatively early hour this morning, I find I have been quite mistaken, and that it is the frantic effort of someone trying to sing with piano accompaniment, and during the day we are treated by way of variety to dreadful scrapings on a violin, with accompaniments. If the accompaniments are intended to drown out the vocal shrieks or teased catgut vibrations, I can assure you it is a failure, for they do not... If it is not discontinued, I shall be compelled to take very serious notice of it. It may be fine sport to you, but it is almost death to yours truly."

The Christies did not reply to this letter, and starting the next day, whenever they began to play music, it would be accompanied by Davey knocking on the party wall, beating on trays, whistling, shrieking and imitating what was being played. The Christies brought an action for nuisance!

HELD: An injunction was granted to prevent Davey from causing or permitting any sounds or noises in his house, so as to vex his neighbours, the court being satisfied that he was only making the noises in question with the malicious intent of annoying them.

"If what has taken place occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the defendant was done only for the purpose of annoyance, and in my opinion, it was not a legitimate use of the defendant's house to use it for the purpose of vexing and annoying his neighbours."

per North J at p.326

28.37 **Hollywood Silver Fox Farm Ltd. v. Emmett [1936] 2 KB 468**

The plaintiffs carried on the business of breeding silver foxes on their land. During the breeding season, the vixens are very nervous and if disturbed are liable to miscarry or to kill their young. Following a dispute about a signpost, the adjoining landowner maliciously caused his son to fire guns on his own land as near as possible to the breeding pens for the purpose of interfering with the breeding of the foxes.

HELD: Although the firing took place over the defendant's land, where he was entitled to shoot, the plaintiffs were entitled to an injunction to stop him doing so in this malicious manner.

28.38 **Church of Jesus Christ of Latter Day Saints v. Price [2004] EWHC 3245**

Price was an Anglican minister who described himself as a "Missionary to the Mormons", as for at least 20 years his ministry had involved preaching about what he regarded as the sinister, anti-social and unchristian nature of Mormonism. To this end, he took to doing all he could to disrupt the activities at the London Mission of the Mormons on Exhibition Road in South Kensington by standing for hours on end outside the building and ranting. A typical example of his activities came when he disrupted a baptism service by shouting through the window: **"You don't believe in the real Jesus! Mormons are Devil worshippers!"**

The claimants alleged that Price had caused excessive noise outside their properties, and had made comments offensive to members of the church in such a way as unreasonably to interfere with their use and occupation of those properties, thus constituting a private nuisance. The defendant contended that he was simply engaged in open-air preaching, which is a well-established and reasonable activity, and that he had to be loud to be heard above the traffic on Exhibition Road.

In holding that Price's activities DID constitute a private nuisance, Beatson J. emphasized that it was the deliberate targeting of the abuse in order to upset the occupiers of the mission building, as well as its frequency and extent, that made it unreasonable.

"On the evidence before me, his activity and speech are sometimes targeted at religious and other activities within the claimants' buildings… It does not follow that because untargeted activities may be a reasonable use of the highway, even when, as in the case of the example of the Salvation Army band they involve noise, that targeted activities are also reasonable. In considering whether they are, account must be taken of what is said or done and account must also be taken of the degree of repetition." per Beatson J at para 167

vii. Causing physical damage

28.39 Where an alleged nuisance causes material injury to property, it is usually taken to be unreasonable, even if the locality in question is devoted to the work in question.

28.40 **St. Helen's Smelting Co. v. Tipping [1865] 12 LT 776 (HL)**

The defendants were liable when fumes from their copper smelter damaged the plaintiff's trees and shrubs. It was no defence to an action against physical damage caused by a nuisance that the site was suitable for the operation. If no place could be found where such a business could be carried on without causing property damage, it should not be carried on at all.

"My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort...

"But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

per Lord Westbury LC

28.41 Even a brief one-off incident is likely to be regarded as a nuisance if there is property damage, although in such cases it is more usual to bring the action in negligence.

Crown River Cruises Ltd. v. Kimbolton Fireworks Ltd. [1996] 2 Lloyd's Rep. 533

28.42 It must also be remembered that damages for physical damage can only be recovered where the loss suffered is reasonably foreseeable, and if it is not foreseeable that an otherwise legitimate activity will cause damage or interference, it might not have been unreasonable to do it.

Northumbrian Water Ltd. v. Sir Robert McAlpine Ltd. [2014] EWCA Civ 685

SRM was redeveloping a site in Newcastle near to a sewer, which involved drilling a deep shaft into the ground and filling it with concrete. SRM conducted extensive investigations beforehand to ensure that it would not interfere with any subterranean drains, but failed to notice an ancient private drain which was connected to the claimant's main sewer. The concrete got into the drain and blocked it, causing the claimant great expense, which it claimed off SRM in both negligence and nuisance. In fact, the drain was only marked on a historic plan kept at The Discovery Museum.

HELD: SRM had taken reasonable steps to avoid causing damage to private drains, and was not negligent in omitting to have checked the museum exhibit. Given the one-off nature of the activity and the fact SRM could not reasonably have foreseen the interference with NW's property, it was also not a private nuisance.

viii. The cost of non-abatement

28.43 In some cases, particularly those arising from naturally occurring hazards, the courts have adopted an essentially subjective approach in asking questions about the particular financial circumstances of the defendant in deciding what should reasonably have been done to prevent or remove a nuisance. [8]

28.44 There are three possibilities:

1. Where the remedial cost would be so excessive to the defendant as to excuse inaction.

28.45 **Solloway v. Hampshire County Council (1981) 79 LGR 449**

Householders whose property was damaged by encroaching tree roots sued the local authority which was responsible for them. HELD: The authority was not liable as it lacked the resources to undertake checking and remedial work to all buildings in their area which might be affected by encroaching tree roots.

"If it could be said to be a reasonably foreseeable risk, I am satisfied that it was a risk such that the cost and inconvenience of taking steps to remove or reduce it would be quite out of proportion to the risk." per Sir David Cairns

2. Where the remedial cost would NOT be so excessive to the defendant as to excuse inaction.

28.46 **Marcic v. Thames Water Utilities Ltd. [2003] 3 WLR 1603 (HL)**

TWUL is a statutory sewerage undertaker, responsible under the Water Industry Act 1991 for providing sewers for the removal of sewage and surface water in the Thames region. As a result of their sewers becoming over-used, sewerage sometimes flooded into the claimant's garden. TWUL could have prevented this, but only at great expense since in order to abate the nuisance they would have to have purchased land to construct the necessary works. They claimed that they had to prioritise the use of their assets, and that the claimant's garden had not been on their to-do list.

It was held by the **Court of Appeal** that even if TWUL's system of priorities had been a fair and reasonable one (which it was not) they could hardly plead poverty as an excuse for not abating a nuisance when they were part of Thames Water plc, an enormously profitable commercial enterprise which had chosen to operate a sewerage undertaking scheme as a business.

[8] *Leakey v. National Trust* [1980] QB 485 (CA)

"Where a massive corporation, such as Thames, is carrying on business as a sewerage undertaker, we consider that the common law duty to take reasonable steps not to permit a nuisance to continue will often involve the requirement to add to the substantial land areas it already owns."

per Lord Phillips M.R. at para 90[9]

3. Where the total cost would so excessive to the defendant that it ought reasonably to be SHARED between the parties

28.47 Where the problem is not the fault of the defendant and the cost of abatement would be excessive for the defendant, the court might consider that it should be shared between the claimant and defendant. Or, to put it another way, it may be reasonable for the defendant only partly to remedy the problem and leave the rest to the claimant.

28.48 **Goldman v. Hargrave [1967] 1 AC 645 (PC)**

"One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, in Scrutton LJ's hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances.

"Thus, less must be expected of the infirm than of the able bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstances should, have done more."

per Lord Wilberforce at p.663

28.49 However, although the relative wealth of the parties may broadly affect the way the costs are distributed, this is not necessarily the case. It depends on all the circumstances of the particular case. It may be more relevant to consider the extent to which both parties will benefit from the remedial works.

28.50 **Abbahall Ltd. v. Smee [2002] 1 All ER 465 (CA)**

The case concerned a mews property in London SW7. The property was on three floors, the top two owned by Miss Smee as a flying freehold, who had gained them by adverse possession (i.e. she squatted there until she owned them!). The ground floor was owned by Abbahall Ltd. and occupied as commercial premises by Round About Chelsea Ltd. Smee allowed the roof to fall into disrepair with the consequence that water leaked into the ground floor and there was a danger of masonry falling onto visitors on the ground floor.

In November 1994 Abbahall obtained an injunctive order to enter Smee's premises to carry out urgent repairs, though nothing was said about who should pay the costs. They had those repairs done then sued Smee for the £7,255 spent on them and a further £23,617.50 for further necessary works.

The trial judge held that although Smee was liable in negligence and nuisance, she was only required to pay one quarter of the costs of the repairs, whilst Abbahall should pay three quarters themselves. This was largely on the basis that Smee had very little money, applying the judgment in *Goldman v. Hargrave* [1967].

Abbahall appealed on the basis that Smee should pay all the costs of the repairs. Smee contended that as she was poverty stricken, whilst the claimant was wealthy, her portion should not be increased. The Court of Appeal disagreed with both, but did increase Smee's portion to one half on the basis of equality being equity.

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[9] n.b. The House of Lords allowed the appeal by TWU, but on an entirely different basis: that under the Water Industry Act 1991 the sole remedy for a contravention of the sewerage undertaker's general drainage obligations lies in the enforcement procedure set out in s.18, a remedy which had not been pursued by the claimant. In fact, the Lords did not think that TWU was in contravention of its statutory obligations and did not consider that the common law of nuisance (even had it been available) could have imposed on TWU an obligation inconsistent with the statutory scheme.

On the subject of the apportionment...

"In my judgment, there are therefore three broad principles which emerge from the authorities:

(i) First, the duty on Miss Smee to do what was reasonable in all the circumstances...

(ii) Secondly, in determining how the burden of meeting the cost of the repairs is to be borne by or as between Miss Smee and Abbahall, the court must strive to reach a result which is fair, just and reasonable...

(iii) Thirdly, in determining what is reasonable...the key to the solution is Lord Cooke of Thorndon's concept of what is 'fair, just and reasonable'...

"In a case such as this, where the roof serves equally to protect both the claimant's premises and the defendant's premises, common sense, common justice and reasonableness as between neighbours surely all suggest that those who are to take the benefit of the works ought also to shoulder the burden of paying for them... To throw the entire burden either onto the claimant or onto the defendant would be unjust, unfair and unreasonable. It would also be unneighbourly."

per Munby J. at paras 36 & 38

On the subject of Miss Smee's plea of poverty...

"In my judgment it is simply not reasonable as between neighbours for Miss Smee to say that because of her poverty her only obligation is to allow Abbahall entry to her property to carry out the repairs at its sole expense. Reasonableness between neighbours who choose to live together in the same building, sharing the same roof, requires that all share, and share equally, the cost of repairing and maintaining the roof.

"The reality, assuming that Miss Smee really does not have the money to pay her appropriate share of the cost, is that she is choosing to live in a property she cannot afford. In this context there is, as it seems to me, force in Mr. Ticciati's comment (for the claimant) that Miss Smee is being asked to do no more than any ordinary householder would ordinarily do without compulsion. If she cannot afford to do so, then I can see no reason why her poverty should throw the burden, or an increased burden, on her neighbour. If she cannot afford to maintain the flat, she should move to a property which she can afford." per Munby J. at para 60

ix. The utility of the defendant's conduct

28.51 The claimant, will not generally render it 'reasonable'. However, it might affect whether or not an injunction will be granted.

Cases where an injunction was granted despite the utility of the conduct

28.52 **Adams v. Ursell [1913] 1 Ch 269**

The plaintiff was a vet who had lived with his family in a house in Silver Street, Dursley since 1905. In November 1912, the defendant started up a fried fish shop in premises adjoining the plaintiff's house. The effect of this was that the smell of fried fish pervaded every room in the vet's house and that the vapour hung like a mist in his house and flavoured the food in his larder. There was a strong petition from most of the local residents to ask for this nuisance to be abated. The defendants argued that to close down the shop would cause great hardship both to the defendant and to the working people who came to his shop for cheap food. HELD: An injunction would be granted. If he was doing such good for the poor people of the town with his shop, the defendant should find a more suitable place to carry on his business.

28.53 **Kennaway v. Thompson [1981] QB 88 (CA)**

Mary St. Joan Kennaway owned land next to a man-made lake on which a motor boat racing club had organised and carried on racing and water-skiing activities since the early 1960's. Having obtained planning permission in 1969, she built a house, and went into occupation of it in 1972. From about 1969 there was a considerable increase in the club's activities, and by 1977 there were race meetings most weekends between April and October with large, noisy boats taking part. In 1977, the plaintiff sued the defendants as representatives of the club claiming damages and an injunction for nuisance.

Mais J. awarded her £1,000 damages for past nuisance, but refused to grant an injunction which, he said, would be oppressive because there was considerable public interest in the club. He awarded her £15,000 damages in lieu, this being the reduction in value of her house caused by the nuisance.

HELD: The Court of Appeal granted the injunction. The public interest in continuing the activity constituting the nuisance did not prevail over the private interest in obtaining an injunction.

Cases where an injunction was not granted because of the utility of the conduct

28.54 **Miller v. Jackson [1977] 3 WLR 20 (CA)**

Members of a village club played cricket in the evenings and at weekends in the summer months on a small ground where cricket had been played since about 1905, when it was surrounded by fields. In 1970 a line of houses was built on the adjacent site which were so positioned that it was inevitable that some balls hit beyond the boundary would fall into their gardens or against the houses themselves, despite the six-foot concrete boundary fence. John and Brenda Miller bought one of the houses in 1972, and by 1975 had counted 13 incidents of balls landing on their property, despite the fence being raised to 15 feet.

They claimed that their property had been damaged and they were afraid to sit in their garden whilst cricket was being played. It was held that the defendants were liable for negligence and nuisance, despite the greater good of allowing cricket to continue. However, they would only be awarded damages, not an injunction.

Lord Denning M.R. gave a famous dissent in which he pleaded for the greater good to prevail, and said that there should be no liability at all in either negligence or nuisance.

"In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers… If [the plaintiff] does not like that, he ought to sell his house and move elsewhere. I expect there are many who would gladly buy it in order to be near the cricket and open space. At any rate he ought not to be allowed to stop cricket being played on this ground."

per Lord Denning M.R. (dissent) at p.24/30

28.55 **Dennis v. Ministry of Defence [2003] Env LR 34**

In 1678 Walcot Hall was built in the beautiful Cambridgeshire countryside, nestling in 1,387 acres of agricultural estate. It is a Grade 1 listed building, and could be used for many commercial ventures, such as receptions and as a film set, except...

In 1969, nearby RAF Wittering became the home of the Harrier Jets. Pilots in training now regularly fly across the Walcot estate, making noise in excess of 100 dB. (A high-speed train at 2 metres is 105 dB; a heavy lorry at 3 metres is 90 dB; a pneumatic drill at 5 metres is 100 dB.)

In 1986, the owner of Walcot, Darby Dennis, wrote to his Parish Councillor: **"Several nights recently, the low and constant flying woke up the whole household and had the children crying. The aircraft were doing circuits and landings with 180 degree turns directly over the house, opening up the throttle on the outside of the turn prior to landing. The noise was so deafening that I could feel the juddering vibration in the house! On fine days we have the same, terrifying any children who happen to be outside, and some adults too. It is virtually impossible to talk and I'm concerned that the noise could affect the children's eardrums. We also seriously believe that the vibrations could be causing damage to the roofs of this house and outbuildings."**

This letter was forwarded to the Ministry of Defence who expressed regret for Mr. Dennis's situation, but made no effort to do anything about it. Mr. Dennis, and many others, continued to complain to no avail, until in 1994, Mr. Dennis began proceedings against the MoD.

The MoD claimed that they could not be blamed for carrying out their vital work of training pilots, and that not only would it be impractical to do it somewhere else, but that this would simply relocate the nuisance.

The court accepted that public interest demanded that the work should continue at this location, but said that this did not prevent the noise from being a nuisance. It did, however, preclude the possibility of granting an injunction, and damages of £950,000 would be awarded.

"What is the effect of a public interest in an activity continuing, where that activity would otherwise constitute a nuisance? It seems to me that it would be unsatisfactory to attempt a general answer. It will depend on all the circumstances, not least the strength of the public interest in question. If public interest can be a relevant consideration, one solution would be that the particular public interest should be put on the scales at the stage when the court is seeking to balance the competing interests of the parties...

"The problem with putting the public interest into the scales when deciding whether a nuisance exists, is simply that if the answer is no, not because the claimant is being over-sensitive, but because his private rights must be subjugated to the public interest, it might well be unjust that he should suffer the damage for the benefit of all. If it is to be held that there is no nuisance, there can be no remedy at common law. As this case illustrates, the greater the public interest, the greater may be that interference. If the public interest is considered at the remedy stage and since the court has a discretion, the nuisance may continue but the public, in one way or another, pays for the benefit...

"I therefore hold that a nuisance is established but that the public interest clearly demands that RAF Wittering should continue to train pilots... In reaching that conclusion I have had in mind, in particular, the nature of the public interest, the defence of the realm, the enormous inconvenience and cost of uprooting RAF Wittering to another location and that, even assuming one might be found away from the population, it would not generally be as convenient as Wittering." per Buckley J. at paras 44-48

Cases where the utility of the conduct made it reasonable, and therefore not a nuisance at all.

28.56 **Hughes v. Riley [2006] Env. LR 12 (CA)**

Richard Hughes and Carol Woods lived in a converted barn in the village of Silverstone in Northamptonshire. Nigel and Ann Riley owned the adjoining premises known as 'Shop and Post Office', it being a shop and post office. There was a lean-to structure at the back of the post office which abutted the west gable of the barn, and the trouble came when the Rileys decided to use it as a sorting office (rather than sorting it elsewhere, as they had done in the past.). This caused all sorts of problems for the neighbours, who complained *inter alia* about of the noise of mail being delivered to the shop; slamming van doors, the clatter of the sorting office; and even the noise of newspapers being delivered to the shop (though that had nothing to do with the sorting office.)

The result of all this was that they were woken up at 6.45 every morning by the noise. The trial judge and the Court of Appeal were sympathetic to the claimants' plight, but held that, on balance, the defendants were behaving reasonably and that there was therefore no nuisance.

"In the circumstances of this case, there has to be a balance between the claimants' desire to use the converted barn as a residence, and the need – and, no doubt, the wish – of the Rileys to use the Shop and Post Office to serve the requirements of the community. It is inevitable that a Village Shop and Post Office selling newspapers and distributing mail will need to have early morning deliveries. Newspapers need to be in the Village Shop at a time when those who buy newspapers wish to buy them. Mail needs to be in the sorting office at a time which allows it to be sorted for delivery to the recipients at the beginning of the day. The judge clearly thought that the right balance had been achieved in this case, when he said: "[The use] is part and parcel of that to be expected of a shop of this kind within a village in the early morning." per Chadwick LJ at para 30

29 PRIVATE NUISANCE AND HUMAN RIGHTS

29.1 **Marcic v. Thames Water Utilities Ltd. [2003] 3 WLR 1603 (HL)**

This case raised the issue of the application of the Human Rights Act 1998 to cases of nuisance.

The householder whose garden was flooded and ruined by the sewerage escaping from the defendant's sewers claimed, *inter alia*, that TWU's failure to carry out works to prevent the flooding constituted an interference with his right to respect for his home under Art 8 of the Convention and of his entitlement to peaceful enjoyment of his possessions under Art 1 of the First Protocol, and that therefore TWU was in breach of s6(1) of the Human Rights Act 1998 which renders it unlawful for a public authority to act in a manner which is incompatible with convention rights.

The trial judge, who thought that the claim for nuisance must fail because of the defendant's position as a statutory body, upheld the claim under the HRA 1998, though this meant that damages could only be awarded for loss suffered since the Act came into force in October 2000.

The Court of Appeal held that TWU **was** liable for common law nuisance, and as this provided better damages than the HRA 1998 claim, it was unnecessary to decide the point. However, Lord Phillips M.R. did indicate that he was unconvinced by the defendant's arguments against the trial judge's findings, suggesting that this nuisance was indeed a breach of human rights. (paras 105-111)

The House of Lords found for the defendant on the nuisance point on the basis that the claimant's case was effectively prohibited by the exclusive enforcement procedure laid down in the Water Industry Act 1991.

They also found for the defendant on the HRA 1998 point. As there was a statutory scheme in place to deal with the management of the sewers, Marcic's claim came down to the issue of whether that scheme was Convention-compliant.

Despite sympathising with Marcic's particular problems, the Lords considered that the scheme itself was reasonable, particularly since it contained within it an avenue for complaint which Marcic had not taken.

"In the present case the interests Parliament had to balance included, on the one hand, the interests of customers of a company whose properties are prone to sewer flooding and, on the other hand, all the other customers of the company whose properties are drained through the company's sewers. The interests of the first group conflict with the interests of the company's customers as a whole in that only a minority of customers suffer sewer flooding but the company's customers as a whole meet the cost of building more sewers.

"As already noted, the balance struck by the statutory scheme is to impose a general drainage obligation on a sewer undertaker but to entrust enforcement of this obligation to an independent regulator who has regard to all the different interests involved. Decisions of the Director are of course subject to an appropriately penetrating degree of judicial review by the courts.

"In principle this scheme seems to me to strike a reasonable balance. Parliament acted well within its bounds as policy maker. In Mr. Marcic's case matters plainly went awry. It cannot be acceptable that in 2001, several years after Thames Water knew of Mr. Marcic's serious problems, there was still no prospect of the necessary work being carried out for the foreseeable future. At times Thames Water handled Mr. Marcic's complaint in a tardy and insensitive fashion. But the malfunctioning of the statutory scheme on this occasion does not cast doubt on its overall fairness as a scheme. A complaint by an individual about his particular case can, and should, be pursued with the Director pursuant to the statutory scheme, with the long stop availability of judicial review. That remedial avenue was not taken in this case." per Lord Nicholls at paras 42 and 43.

29.2 **Dennis v. Ministry of Defence [2003] Env LR 34**

The court considered that the noise from the Harrier Jets was also probably a breach of Dennis's human rights under the HRA 1998, in particular the Article 8.1 right to respect for private and family life, home and correspondence. However, it was considered that the substantial award of damages for common law nuisance addressed this issue.

29.3 **Hatton v. United Kingdom (2003) 37 EHRR 28**

Ruth Hatton lived in East Sheen with her husband and two children from 1991 to 1997. Her house was 11.7 km from the end of the nearest runway at Heathrow. In 1993 a new government scheme was implemented permitting additional night flights, which meant that she was frequently awoken in the early hours by the sound of aircraft activity which had previously been prohibited. She, and seven other applicants with similar complaints, claimed that the Government policy gave rise to a violation of their rights under Art. 8 of the Convention and also that they were denied an effective remedy for this complaint, contrary to Art. 13.

The ECHR found that although there had been no violation of Art. 8 (the right to respect for private and family life etc.) there had been a violation of Art. 13. As the flights were lawful, the complainants had no rights of action in either trespass or nuisance under domestic law, and the scope of judicial review at the time (prior to the coming into force of the HRA 1998) did not afford them an effective forum.

The complainants were each awarded 50,000 euros.

29.4 **Dobson v. Thames Water Utilities Ltd. [2009] EWCA Civ 28**

Thames Water created a nuisance on land belonging to the residents near to its Mogden Sewage Treatment Works in Isleworth. The Court of Appeal was asked to determine, *inter alia*, whether an action under article 8 could:

(i) increase an award already made to the land proprietors for private nuisance;

(ii) provide an award for people with no proprietary interest in the land; and

(iii) whether such an award to a non-proprietor could be affected by the fact that an award had already been made for private nuisance to the proprietor.

The answer to all three questions appears to be – it depends! The requirement under article 41 is to do what is necessary to afford just satisfaction to the aggrieved party. Therefore, it is necessary to consider all the facts of any given case on its own merits.

30 POTENTIAL DEFENCES TO PRIVATE NUISANCE

30.1 The general defences apply, such as *volenti*, contributory negligence, *force majeure* and act of a stranger. The following are also of particular relevance:

i. Coming to the nuisance

30.2 It is usually no defence to say that the nuisance was there before the claimant entered the locality.

30.3 **Bliss v. Hall (1838) 4 Bing. NC 183**

The defendant made candles in his tallow factory, emitting "divers noisome smells" for three years. The plaintiff then took up residence nearby.

HELD: There was an actionable nuisance. It was no defence that the plaintiff came to the nuisance.

30.4 **Sturges v. Bridgman (1879) 11 ChD 852 (CA**)

It was no defence for the confectioner to say that he had set up the pestle and mortar in a place where the noise could not disturb anyone, and that it was the physician who had come to him, making it inevitable that he would be affected by the defendant's activities where no-one had been affected previously.

30.5 **Miller v. Jackson [1977] 3 WLR 20 (CA)**

Whilst acknowledging that it was unfair, the Court of Appeal felt bound to follow the rule in *Sturges v. Bridgman:*

"Can the defendants take advantage of the fact that the plaintiffs have put themselves in such a position by coming to occupy a house on the edge of a small cricket field, with the result that what was not a nuisance in the past now becomes a nuisance? If the matter were res integra, I confess I should be inclined to find for the defendants. It does not seem just that a long-established activity – in itself innocuous – should be brought to an end because someone chooses to build a house nearby and so turn an innocent pastime into an actionable nuisance. Unfortunately, however, the question is not open… We are bound by the decision in Sturges v. Bridgman." per Geoffrey Lane LJ at p.34/35

30.6 **Lawrence v. Fen Tigers Ltd. [2014] AC 822 (Supreme Court, England)**

"For some time now, it has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started i.e. that it is no defence that the claimant has come to the nuisance…

"Furthermore, the notion that coming to the nuisance is no defence is consistent with the fact that nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. It would also seem odd if a defendant was no longer liable for nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged." per Lord Neuberger at paras 47 and 52

30.7 However, the rule in *Sturges v. Bridgman* does not apply where a landlord lets to a tenant premises which are already ripe with nuisance.

Baxter v. Camden London Borough Council (No.2) [1999] 2 WLR 566 (CA)

The Court of Appeal considered *obiter* whether, had there been an actionable nuisance, the landlord would have had the defence that the interferences were already there when the tenant took the premises. It was held that coming to the nuisance in such a case was a good defence. A tenant takes a lease as he finds it. Such cases are decided on the *caveat lessee* principle, and *Sturges v. Bridgman* has no application. (The matter was not referred to by the House of Lords.)

ii. Twenty years prescription

30.8 If one openly performs an actionable private nuisance for twenty years without licence, secrecy or force, one may gain a prescriptive right to continue.

Lawrence v. Fen Tigers Ltd. [2014] AC 822 (Supreme Court, England)

"The essential feature of prescription for present purposes is that, in order to establish a right by prescription, a person must show at least 20 years uninterrupted enjoyment as of right, that is nec vi, nec clam, nec precario (not by force, nor stealth, nor with the licence of the owner)…

"I am of the view that the right to carry on an activity which results in noise, or the right to emit a noise, which would otherwise cause an actionable nuisance, is capable of being an easement. The fact that the noise from an activity may be heard in a large number of different properties can fairly be said to render it an unusual easement, but, as Mr. Robert McCracken QC for the respondents said, whether or not there is an easement is to be decided between the owner of the property from which the noise emanates and each neighbouring property owner." per Lord Neuberger at paras 31 and 33

30.9 However, the twenty years starts to run not from the time the activity starts, but from the time when the activity becomes a nuisance.

30.10 **Sturges v. Bridgman (1879) 11 ChD 852 (CA)**

Although the confectioner had used his large pestles and mortars for more than twenty years, he did not gain a prescriptive right, as the time only started running when his activities became an actionable nuisance, (i.e. when the doctor built his consulting rooms).

30.11 **Dennis v. Ministry of Defence [2003] Env LR 34**

The court refused to accept that the MoD had gained a prescriptive right to make noise for several reasons. First, the Harriers had not been flown at the same height and noise level for 20 years, and so there was no consistency of behaviour. Furthermore, they had not flown without objection as there had been constant protests from the affected neighbours.

iii. Conduct permitted by statute

30.12 However, an authority will not normally be acting *intra vires* to cause substantial interference, unless the interference is the 'inevitable' consequence of the work.

30.13 **Manchester Corporation v. Farnworth [1930] AC 171 (HL)**

The plaintiff was a farmer whose fields were destroyed by the poisonous fumes emitted from the chimneys of an electric power station erected and operated by the defendant corporation. The defendants pleaded that they were empowered to set up the station under the Manchester Corporation Act 1914, s.32. The Court of Appeal granted an injunction and damages. On appeal to the House of Lords, it was held that the injunction should be suspended for a year, during which time the Corporation should investigate methods of avoiding the mischief complained of.

"When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. Now it is true that in this case we can hold so far that by their callous indifference in planning the construction of the station to all but its own efficiency, the defendants have not discharged the onus incumbent on them." per Viscount Dunedin at p.183

30.14 **Allen v. Gulf Oil Refining Ltd. [1981] AC 1001 (HL)**

In pursuance of powers conferred on them by the Gulf Oil Refining Act 1965, the defendants built a refinery and associated works on a 400-acre site in Waterston, in Dyfed. Although the works disturbed the local residents with noxious odours, vibrations and offensive noise, as well as the constant fear of an explosion, there was held to be no actionable nuisance. The works had been authorised by statute, and the operators were therefore immune from proceedings for any nuisance which was an inevitable result of the construction and operation of those works.

30.15 **Jones v Cleanthi [2006] EWCA Civ 1712**

Under her lease, Jones had the right to use the communal refuse bins at the rear of the building. In 1995 the then landlord had erected a wall across the passage on the ground floor of the building leading to the rear area, thereby blocking off all access by residents to the rear area and communal refuse bins, pursuant to a notice served on him by the local housing authority under the Housing Act 1985 s. 352, requiring him to do so in order to maintain adequate fire precautions.

Jones claimed a declaration as to the continuing existence of the rights under the lease and an injunction preventing the current landlord (Cleanthi), as the former landlord's successor in title, from interfering with them.

It was held that the s. 352 notice imposed a statutory obligation on the landlord to carry out the specified works, including the erection of the wall. The fact that in erecting the wall B was discharging a statutory obligation was a complete defence to a claim in nuisance.

30.16 The defence of statutory authority will not work where the authority merely comes from the local council (e.g. as planning permission) rather than from Parliament.

Wheeler v. J.J. Saunders Ltd. [1995] 2 All ER 697 (CA)

In this case the defendants had obtained planning permission to build their pig housing units, but this did not afford them a defence:

"I do not consider that planning permission necessarily has the same effect as statutory authority. Parliament is sovereign and can abolish or limit the civil rights of individuals... The planning authority on the other hand has only the powers delegated to it by Parliament. It is not in my view self-evident that they include the power to abolish or limit civil rights in any or all circumstances."

per Staughton LJ at p.704

See also paras 28.28 to 28.33 above

30.17 The burden of proving that the nuisance is an inevitable consequence of statutory works is on the statutory body.

Marcic v. Thames Water Utilities Ltd. [2002] 2 All ER 55 (CA)

"Thames have not sought to establish that the flooding of Mr. Marcic's property was the inevitable consequence of the exercise of their statutory duties or powers so that they have not been negligent in the special meaning of that word in Allen's case. As that case makes plain, the burden of establishing this defence falls on Thames. In the event the judge held that Thames had the resources and the powers necessary to remedy the nuisance. It follows that no defence of statutory authority has been made out." per Lord Phillips M.R. at para 62

n.b. TWU won in the House of Lords on other grounds

30 REMEDIES FOR PRIVATE NUISANCE

i. Injunction

31.1 An application may be made to the court for an order to restrain further acts constituting the nuisance, if it can be proved that the nuisance will recur and do irreparable damage to the claimant. However, an injunction will not be granted where either damages are an adequate remedy or where public interest requires the activity to continue.

31.2 **Shelfer v. City of London Electric Lighting Company [1895] 1 Ch 287 (CA)**

The Court of Appeal examined the criteria by which it would decide whether to grant an injunction or damages.

"Many judges have stated, and I emphatically agree with them, that a person committing a wrongful act...is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance... In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.

"There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section... In my opinion, it may be stated as a good working rule that:

i) If the injury to the plaintiff's legal rights is small; and

ii) is one which is capable of being estimated in money; and

iii) is one which can be adequately compensated by a small money payment; and

iv) the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given." per A.L. Smith LJ at p.322

31.3 **Miller v. Jackson [1977] 1 QB 966 (CA)**

An injunction was not granted as the court considered that this would not, on balance, be in the public interest. Damages were granted instead.

This decision can be seen as a policy decision to overcome a disastrous planning decision, but it is difficult to reconcile with *Adams v. Ursell* (1913) and *Kennaway v. Thompson* (1980).[10]

31.4 **Goode v. Owen [2001] EWCA Civ 2101**

Harry Goode, a cattle and sheep farmer, complained about the activities of the golfers on the neighbouring golf driving range, owned by the defendant. About 1,000 golf balls a year landed on the claimant's land, making part of it unsuitable for making hay or silage. The affected area was about one and a half acres, but the farmer claimed that he was precluded from using any of the land (about 18 acres) as mowing it would prove too difficult if he had to keep turning corners to avoid the affected land. The trial judge ordered the erection by the defendants of a 40-foot fence, at the cost of about £60,000 plus maintenance, even though this would only partially address the problem.

The Court of Appeal overturned this order. They did not accept that the farmer could not mow and use the uncontaminated land, and thought that the erection of an expensive fence partially to protect the rest would place an unfair burden on the defendant. They considered that an order for damages would therefore be more appropriate.

[10] See also *Dennis v. Ministry of Defence* [2003] Env LR 34.

31.5 **Regan v. Paul Properties DPF No.1 Ltd [2007] Ch 135 (CA)**

The appellant (R) appealed against a decision to award him damages, rather than an injunction, following the finding that the respondent developers (P) had infringed his right to light.

P had begun developing two properties directly across the road from R's property. From the beginning, R had expressed concern about the effect of the development on the right to light in his property. P took advice from a surveyor, who found that the loss of light would be minor and would not give rise to an actionable injury, and carried on with the works. R sought an injunction in relation to one particular unit in the development.

The judge found that an actionable nuisance had been committed, rendering the enjoyment of R's living room significantly less comfortable and beneficial than it had been previously, but that the right course was to grant R damages in substitution for an injunction. The judge purportedly based his decision on *Shelfer v. City of London Electric Lighting Company* [1895] 1 Ch 287, finding that it would be oppressive to P to grant an injunction, and that the injury to R's legal rights was small, capable of being estimated in money and could be adequately compensated by a small money payment. R contended that the judge had misdirected himself in law, in ruling that the refusal of an injunction in infringement of right to light cases and the grant of damages in lieu was not an exceptional course.

Held, allowing the appeal, that the case of *Shelfer v. City of London Electric Lighting Company* established that a claimant was *prima facie* entitled to an injunction against a person committing a continuing nuisance that invaded his legal right, and that the discretion to grant an award of damages in substitution for an injunction should be exercised only in very exceptional circumstances.

31.6 **Lawrence v. Fen Tigers Ltd. [2014] AC 822 (Supreme Court, England)**

"The approach to be adopted by a judge when being asked to award damages instead of an injunction should, in my view, be much more flexible than that suggested in the recent cases of Regan [2007] Ch 135 and Watson [2009] 3 All ER 249. It seems to me that (i) an almost mechanical application of A L Smith LJ's four tests, and (ii) an approach which involves damages being awarded only in very exceptional circumstances, are each simply wrong in principle, and give rise to a serious risk of going wrong in practice…

"The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in Regan and Watson. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any rm guidance is likely to do more harm than good."

per Lord Neuberger at paras 119 and 120

ii. Damages

31.7 Damages will only be awarded for such loss as is the reasonably foreseeable consequence of the nuisance. This principle originates from a famously confusing *dicta* by Lord Reid in *The Wagon Mound (No 2)* [1967].

Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (Wagon Mound No. 2) [1967] AC 617 (PC)

The facts were the same as Wagon Mound (No 1) except that the claimant in the latter case was the owner of a vessel moored in the wharf who sued for public nuisance. It was held that it is not sufficient to show that an injury suffered is the direct result of a nuisance: It must also be foreseeable.

"Negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not essential... And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability."

31.8 The issue was clarified by the House of Lords in *Cambridge Water Co. v. Eastern Counties Leatherwork plc* [1994] 1 All ER 53, where it was explained that there is a fault-based test for remoteness of damage similar to that in negligence - i.e. the injury must have been reasonably foreseeable.

31.9 **Cambridge Water Co. v. Eastern Counties Leather plc [1994]** 1 All ER 53 (HL)

The defendant was an old-established leather manufacturer which used organochlorines as solvents for degreasing pelts. This solvent frequently splashed on the concrete floor. Although the amounts spilled were very small, between 1879 and 1976 (when there was a change of degreasing method) over 1,000 gallons had been spilled. The spilled solvent seeped through the tannery floor into the soil below until it reached an impermeable stratum 50 metres below the surface. It then percolated along a plume until eventually reaching the strata from which CWC extracted water for domestic use.

HELD: Damages for the unforeseeable injury caused to the water company were not recoverable either in nuisance or under the doctrine of *Rylands v. Fletcher*.

31.10 Damages for nuisance are awarded for the damage caused to the land or to the amenity of the land, not for the inconvenience suffered by the occupiers. This can be quite a fine distinction, as was explained by Lord Hoffman in *Hunter v. Canary Wharf Ltd.* (1997).

Hunter v. Canary Wharf Ltd. [1997] AC 655 (HL)

"In the case of nuisances 'productive of sensible personal discomfort,' the action is not for causing discomfort to the person, but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered 'sensible' injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation…

"There may of course be cases in which, in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business. Or if the land is flooded, he may also be able to recover damages for chattels or livestock lost as a result. But inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness.

"It follows that damages for nuisance recoverable by the possessor or occupier may be affected by the size, commodiousness and value of his property but cannot be increased merely because more people are in occupation and therefore suffer greater collective discomfort." per Lord Hoffman

iii. Abatement

31.11 The claimant may stop the nuisance by removing the cause, but only if he can do so without infringing another's rights. If the abatement is going to involve entry onto the defendant's land, the law generally requires notice to be given of this, except in an emergency. Abatement is not a remedy that the courts favour.

31.12 **Lagan Navigation Co. v. Lambeg Bleaching, Dyeing and Finishing Co. [1927] AC 226 (HL: Northern Ireland**

In 1912, the appellants, in exercise of their statutory authority, raised the coping and banks on the sides of a canal to prevent a lock from being flooded. The respondents, who were adjoining landowners, complained that this caused flooding to their land. In response, the appellants removed the coping but did not lower the banks. In 1924, during a heavy storm, the respondents, without notice to the appellants, cut away at the raised banks to allow flood-water to escape. The appellants sued to prevent this interference with the banks. The respondents justified their acts as having been an abatement of a nuisance. HELD: Assuming that the raising of the banks was a nuisance, the abatement by the respondents was not justified.

"It has been well said that the abatement of a nuisance is a remedy which the law does not favour and is not usually advisable, and that its exercise destroys any right of action in respect of the nuisance... In the abatement of a nuisance unnecessary damage must not be done… Where there are two ways of abating a nuisance, the less mischievous is to be followed… The respondents have...in the high-handed and violent manner in which they have chosen to act, violated every principle laid down by the authorities I have cited touching the abatement of nuisances...They have...altogether failed to justify the course they took." per Lord Atkinson at p.244 **cf. *Lemmon v. Webb* (1895)**

31.13 **Burton v. Winters [1993] 1 WLR 1077 (CA)**

Everybody needs good neighbours. Mr. & Mrs. Winters' predecessor in title built a garage on the boundary of his property, which encroached 4.5 inches onto the plaintiff's property. The plaintiff, Mrs. Burton, sued for an injunction in trespass and nuisance to have Mr. Winters remove the garage insofar as it encroached on her land. Her claim was dismissed by both the High Court and the Court of Appeal, as there was no evidence that the encroachment was interfering with her reasonable enjoyment of the property. She was awarded damages, and was refused permission to appeal to the House of Lords. She was not satisfied!

She started to build a brick wall in front of the garage on the defendant's land. When she refused to stop (despite a court order that she should do so) she was sent to prison for 12 months! When she got out, she ignored a further injunction by placing bricks in the defendants' garden, and made a hole in the garage roof. Despite a further suspended sentence of two years imprisonment, she smashed the garage with a sledgehammer, removed the repairs to the roof and started to rebuild the wall in front of the garage. She was sent back to prison for two years.

Mrs. Burton then appealed on the basis that all she was doing was abating a nuisance, which was her right. She made it clear that she was not interested in compensation, would not abide by the order of the court and would not give any undertaking not to damage the garage on her release. HELD: She had no right of self-redress anyway, as there was no emergency, and any rights she may have had would have been lost once the court had refused her an injunction.

"The law does not favour the remedy of abatement. In my opinion, this never was an appropriate case for self-redress even if the plaintiff had acted promptly. There was no emergency. There were difficult questions of law and fact to be considered and the remedy by way of self-redress, if it had resulted in the demolition of the garage wall, would have been out of all proportion to the damage suffered by the plaintiff. But even if there had ever been a right of self-redress, it ceased when Judge Main refused to grant a mandatory injunction… Self-redress is a summary remedy, which is justified only in clear and simple cases, or in an emergency. Where a plaintiff has applied for a mandatory injunction and failed, the sole justification for a summary remedy has gone… This is so whether the complaint lies in trespass or nuisance. In the present case, the court has decided that the plaintiff is not entitled to have the wall on her side of the boundary removed. It follows that she has no right to remove it herself." per Lloyd LJ at p.1082

SECTION THREE: OCCUPIERS' LIABILITY

32 INTRODUCTION

32.1 Even before *Donoghue v. Stevenson,* a special duty of care was owed at common law by the occupier of a premises to those who came upon it. The degree of duty varied according to whether the third party was a contractee, an invitee, a licensee or a trespasser.

- **Contractees** were those who were on the premises in accordance with a contract made with the occupier (e.g. a hotel guest). They were entitled to expect the premises to be as safe as reasonable care could make them.

- **Invitees** were those pursuing a 'common interest' with the occupier (e.g. a customer in a shop). They were entitled to protection from unusual dangers.

- **Licensees** were those who had permission to be on the premises (whether express or implied) but who were not pursuing a 'common interest' with the occupier (e.g. friends). They were entitled to be warned about known dangers.

- **Trespassers** were those with no permission (either express or implied) to be on the premises. They were only entitled not to be deliberately or recklessly injured.

32.2 The matter is now largely regulated by the two **Occupiers' Liability Acts** (1957 & 1984), which distinguish only two categories of potential claimant: 'visitors' (which generally includes all contractees, invitees and licensees) and 'non-visitors' (usually trespassers). However much of the earlier common law is specifically retained.

33 OCCUPIERS' DUTY OF CARE TO VISITORS

33.1 **OLA 1957, s2 (1): An occupier of premises owes the same duty, the 'common duty of care', to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.**

n.b. 1: It is called the 'common' duty of care to emphasise that it is the same duty of care, whatever kind of visitor is involved. Thus, the old distinctions between contractees, invitees and licensees have been abolished for the purposes of this tort.

n.b. 2: Scotland has its own version of the Occupiers' Liability Act 1957, called the Occupiers' Liability (Scotland) Act 1960. There is also an Occupiers' Liability (Northern Ireland) Act 1957. These Acts are virtually the same as the English/Welsh version, so cases decided under these statutes are highly persuasive in the English and Welsh courts.

33.2 This Act raises several problems of interpretation.

i) Who is an 'occupier'?
ii) What are 'premises'?
iii) Who is a 'visitor'?
iv) What is the 'common duty of care'?

34 WHO IS AN OCCUPIER?

i. The statutory definition

34.1 The statute does not give a definition of an occupier, except to say that it is the same as at common law.

OLA 1957 s.1(2): The rules so enacted shall not alter the rules of the common law as to the persons on whom a duty is so imposed and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier are the same as the persons who would at common law be treated as an occupier.

34.2 **Wheat v. E. Lacon & Co. Ltd. [1966] AC 552 (HL)**

"Whenever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier' and the person coming lawfully there is his 'visitor'." per Lord Denning at p.578

ii. Joint occupiers

34.3 There can be more than one occupier of premises. Several cases have considered the question of joint occupiers

34.4 **Wheat v. E. Lacon & Co. Ltd. [1966] AC 552 (HL)**

The defendants were brewers who owned a pub (The Golfers' Arms) which was managed for them by Leonard Richardson, who was the licensee and employed by E. Lacon & Co. under a service agreement. The agreement provided that Richardson should carry on the business of selling Lacon's drinks in the public bar (on the ground floor) and to give Lacon access to the premises for viewing the state of repair and testing the stocks. He was allowed to live in the premises rent-free as long as he was employed by Lacon, and as a special privilege Mrs. Richardson (his wife) was allowed to take in paying guests in the private upper part of the premises.

Two such paying guests were Walter and Heather Wheat. During their stay, Mr. Wheat was found at the bottom of an unlit flight of stairs in the private part of the premises with fatal injuries to his skull. It was conjectured that he was running his hand down the handrail in the dark and fell because the handrail finished several steps before the staircase did. The issues in the case were (i) whether the defendants were 'occupiers' of the first floor of the premises for the purposes of the OLA 1957; and (ii) whether they were in breach of their duty under that Act.

HELD: They *were* occupiers and owed the plaintiff and her husband the common duty of care. However, there was not sufficient evidence to enable any deduction to be made as to the probable cause of the fall, and so they were not liable.

The House of Lords discussed the concept of an occupier, and held that the traditional test of 'immediate supervision and control and the power of permitting or prohibiting the entry of other persons' was too narrow (per Lord Denning p.578). Lacon was an occupier through the occupancy of its servants.

"I ask myself whether the brewery company had a sufficient degree of control over the premises to put them under a duty to a visitor. Obviously, they had complete control over the ground floor and were 'occupiers' of it. But I think that they had also sufficient control over the private portion. They had not let it out to Mr. Richardson by a demise. They had only granted him a licence to occupy it, having a right themselves to do repairs. That left them with a residuary degree of control... They were in my opinion 'an occupier' within the Act of 1957. Mr. Richardson, who had a licence to occupy, had also a considerable degree of control. So had Mrs. Richardson, who catered for summer guests. All three of them were, in my opinion, 'occupiers' of the private portion of the 'Golfer's Arms'. There is no difficulty in having more than one occupier at one and the same time, each of whom is under a duty of care to visitors." per Lord Denning at p.580

34.5 **Stone v. Taffe 1974] 1 WLR 1575 (CA)**

The second defendants were owners and occupiers of the Gate Inn, Saltley. They engaged Taffe as manager under a service agreement, which stipulated that neither his customers nor his friends could remain on the premises after closing time. In breach of this agreement, he permitted a lodge meeting of the **Royal and Antediluvian Order of Buffaloes**[11] to be held in an upstairs room until beyond 1.00 in the morning.

Stone, who was a committee member of the 'Buffs' left at about that time, fell down an unlighted staircase and was killed. Judgment for £16,000 was given to his widow, Mary, against Taffe, but he disappeared without trace or payment, and the widow wanted judgment against the pub owners. It was not disputed that the owners were occupiers of the premises through their manager. The issue was simply whether Stone was their lawful visitor. *(This issue is discussed later.)*

iii. Occupiers who are not in possession of the premises

34.6 There is no requirement that an occupier should actually be in possession of the premises in question.

34.7 **Harris v. Birkenhead Corporation [1975] 1 WLR 37**

Birkenhead Corporation had a programme of slum clearance whereby they would compulsorily acquire certain properties and brick them up pending demolition and redevelopment. One such property was 239 Price Street which was owned by Mrs. Gledhill and occupied by her excellent tenant Mrs. Jean Redmond, who kept the house in good condition. On July 31 1967, the Corporation gave Mrs. Gledhill notice that they would enter the property in 14 days. They stated that they would offer Mrs. Redmond alternative accommodation, but in an interview with them, she said she would make her own arrangements and informed both the Corporation and the agents that she would be out by Christmas. She left on December 23rd, but the property was not bricked up. Vandals broke down the door and amongst other damage removed the glass from a second-floor window.

On March 6 1968, the plaintiff, a four-year-old girl, wandered into the house and fell thirty feet from that window, suffering severe brain damage. It was argued that the Corporation was not solely liable as Mrs. Gledhill was also an occupier

HELD: The Corporation were liable as *sole* occupiers. The effect of the notice to enter, the letter regarding Mrs. Redmond and the conduct of the Corporation in interviewing her was that they had control of the house after December 23 and were in legal occupation of the premises. Judgment was given in the sum of £20,000 against the Corporation.

34.8 **Revill v. Newbery [1996] 1 All ER 291 (CA)**

It was held that a person who rents an allotment is an occupier for the purposes of the OLA 1984.

34.9 **Harvey v. Plymouth City Council [2010] EWCA Civ 860**

It was held *inter alia* that the council was the occupier of land even though it did not know it owned it.

[11] The **Royal Antediluvian Order of Buffaloes** is one of the largest fraternal organisations in the United Kingdom. The order started in 1822 and is known as the *Buffs* to members, who are largely drawn from the world of the theatre.

35 WHAT ARE PREMISES?

35.1 **OLA 1957 s.1 (3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate:**

(a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and

(b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

35.2 Thus, the definition of 'premises' includes anything that would be premises at common law (e.g. land and buildings) but also includes fixed or moveable structures. In fact, the definition covers virtually anything you can get into or onto. Examples of some unusual 'premises' include the following:

- A lift: *Haseldine v. Daw* [1941] 2 KB 343 (CA)
- A diving board: *Ewa Perkowski v. Wellington Corporation* [1959] AC 53
- A drilling machine: *Bunker v. Charles Brand & Son Ltd.* [1969] 2 QB 480
- A ladder: *Wheeler v. Copas* [1981] 3 All ER
- A skip: *Hannington v. Mitie Cleaners* [2002] EWCA Civ 1847
- A bowling alley: *D v. AMF Bowling* [2002] 12 CL 476
- A splat wall: *Gwilliam v. West Hertfordshire Hospitals NHS* [2003] QB 443

36 WHO IS A VISITOR?

36.1 **OLA 1957 s.1 (2): Visitors are the same as the persons who would at common law be treated as... invitees or licensees.**

A visitor is thus a person to whom the occupier has given express or implied permission to enter, as opposed to a trespasser who has no such permission. However, the definition extends also to persons who have no permission, but enter the premises in the exercise of a right conferred by law, such as firemen attending a fire or police officers executing a warrant. (OLA 1957 s.2 (6))

i. Implied Permission

36.2 'Implied permission' indicates that the occupier has objectively given the visitor the reasonable impression that he is permitted to be on the premises, even if that was not the occupier's subjective intention.

36.3 **Lowery (Pauper) v. Walker [1911] AC 10 (HL)**

Walker owned a savage horse which he knew to be dangerous to mankind. He also owned a field, which for thirty or forty years had been used by the public as a short-cut to a railway station. He had sometimes warned people off as trespassers, but he did not sue them as some of them were his customers for milk. Without warning he placed his horse in the field where it bit and stamped poor Mr. Lowery. The trial judge described Lowery as a trespasser, but also held that he was in the field with the permission of Walker because the field had been habitually used by the public as a short cut.

The House of Lords, finding for Lowery, said that the trial judge had used the term 'trespasser' somewhat ambiguously.

"I think it would have been better had he been more explicit in saying what it was that he did find and what it was that he did not find; but I think in substance it amounts to this: that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever either to the plaintiff or the public." per Lord Loreburn L.C. at p.12

36.4 **Gould v. McAuliffe [1941] 2 All ER 527 (CA)**

Mrs. Gould was at a pub when she had occasion to look for the lavatory. She did not ask where it was, but went into the garden at the side of the pub where she knew there was one. On finding it had been removed, she went through an open gate at the other end of the garden, whereupon she was savaged by the licensee's dog. The licensee claimed that she was a trespasser after she had gone through the gate. HELD: She was clearly not a trespasser and the licensee was liable.

"The gate was not locked, nor was there any notice on it that the yard was private, or that trespassers were forbidden, or that there was a dangerous dog there... The facts constitute an invitation by the defendant to persons on his premises. The plaintiff was, therefore, an invitee, not only to enter the garden, but also to use the gate leading, as she mistakenly thought, to a lavatory."

per Scott LJ at p.528

36.5 **Darby v. National Trust [2001] EWCA CIV 189 (CA)**

Kevin Dodd drowned whilst swimming in a murky National Trust pool. Although swimming was not permitted, many people did swim in the pond, there were no notices near the pond to say they should not do so and the NT did very little to prevent people from entering the water. It was held that in the circumstances Mr. Dodd was a visitor for the purposes of the Occupier's Liability Act 1957. **n.b. His widow lost the case on other grounds.**

ii. Implied authority of an employee to invite people onto the employee's premises

36.6 It is possible for people to be 'visitors' even when their presence is **expressly prohibited** by the owner, as long as the visitor does not know of this prohibition. This may be the case where the owner of a commercial property hires a manager to run it. A visitor may assume that the manager has the usual authority of such a manager to permit people to enter, even if the owner has told the manager otherwise. If the manager does have such implied or assumed authority, both the manager and the owner will be liable to the visitor under OLA 1957.

36.7 If an employer gives his employee the **implied** authority to invite people onto the work premises, the employer may be liable for them as visitors even though the invitation goes against the **actual** authority of the employee, provided that the 'visitors' themselves do not know of the prohibition and are entitled to believe that their invitation is within the authority of the employee.

36.8 **Stone v. Taffe [1974] 1 WLR 1575 (CA): (See above.)**

One of the issues was whether Stone was the lawful visitor of the owners of the pub, even after closing time, despite the express prohibition in the management agreement against having visitors on the premises after closing time.

HELD: He was a visitor of the owners. He knew nothing about the prohibition since the owners, through their manager, had not given him any indication that his licence to remain on the premises would be or had been terminated at closing time. As there was no clear limitation to the licence when he was permitted to enter the premises at 8.00 p.m., the deceased was still a lawful visitor at the time of his accident and not a trespasser. The owners were therefore liable. However, as the deceased was half to blame for his misfortune, the damages would be equally divided between the deceased and the defendants.

iii. Rights of way

36.9 The Act does not protect people who are injured on a public right of way since an owner of land that becomes a public right of way has no choice as to who may cross his land. Thus, these people are not the occupier's licensees or visitors (and will subject to the 1984 Act instead.)

36.10 **Gautret v. Egerton (1867) L.R. 2 C.P. 371**

The plaintiff was crossing a bridge which belonged to the defendant. The bridge was in a state of disrepair, and the plaintiff fell from it into a dock and was drowned. The bridge was a public right of way. It was held that there was no actionable breach of duty on the part of the defendants.

"What duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences: but, if I do nothing, I am not." per Willes J at p.373

36.11 **Greenhalgh v. British Railways Board [1969] 2 QB 286 (CA)**

The plaintiff suffered injury through stepping in a pothole while crossing a bridge over the railway. The bridge had originally been built for accommodation purposes, but in the course of time had become a public right of way. The plaintiff's claim for damages failed.

"A 'visitor' does not include a person who crosses land in pursuance of a public or private right of way. Such a person was never regarded as an invitee or licensee, or treated as such."
per Lord Denning M.R. at p.292

36.12 The 'Rule in **Gautret v. Egerton**' was confirmed in **McGeown v. N.I. Housing Executive (1994)**.

McGeown v. Northern Ireland Housing Executive [1994] 3 WLR 187 (HL - NI)

Josephine McGeown was an elderly lady who lived with her husband on a housing estate in Belfast owned by the defendants. Part of the land of the estate was crossed by footpaths, which were public rights of way. Mrs. McGeown was walking on one of these paths when she tripped in a hole and broke her leg. The hole was a danger to people using the path and resulted from a failure to keep the path in good repair.

She sued for damages for breach of the Occupiers' Liability Act (Northern Ireland) 1957, which imposes the same duty of care towards visitors as the OLA 1957. Following *Gautret v. Egerton*, her claim was dismissed.

"The rule in Gautret v. Egerton is deeply entrenched in the law. Further, the rule is in my opinion undoubtedly a sound and reasonable one. Rights of way pass over many different types of terrain, and it would place an impossible burden upon landowners if they not only had to submit to the passage over them of anyone who might choose to exercise them but also were under a duty to maintain them in a safe condition. Persons using rights of way do so not with the permission of the owner of the solum but in the exercise of a right. There is no room for the view that such persons might have been licensees or invitees of the landowner under the old law or that they are his visitors under the English and Northern Irish Acts of 1957." per Lord Keith at p.193

36.13 These decisions seem odd in the light of the specific wording of OLA 1957 which provides:

s.2(6): For the purposes of the section persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they have permission or not, thereby falling within the category of persons to whom the common duty of care is owed.

37 CHILDREN AS VISITORS AT COMMON LAW

i. The Doctrine of Allurement

37.1 The principles of implied licence have been applied with some degree of latitude for the proclivities of children. Children are more likely to be treated as 'visitors' than adults, even when they are technically trespassing. This will especially be the case if the occupier has somehow tempted the unwary child onto the dangerous premises by means of some allurement, deliberately or unwittingly.

37.2 Although the common law doctrine of 'allurement' was developed to protect children before the Acts were passed, it still affects children's rights, as the statutory definition of a visitor is 'the same as at common law'. Thus, if a child 'trespasser' can convince the court he is a 'visitor' for the purposes of the common law, he will also be a visitor for the purposes of the Acts, and will now be protected under OLA 1957, rather than under the far more restrictive provisions of OLA 1984.

37.3 **Glasgow Corporation v. Taylor [1922] 1 AC 44 (HL - Scotland)**

The father of a seven-year-old boy sued Glasgow Corporation when his son died from eating poisonous berries in some public gardens. The berries were grown on a piece of fenced ground which was open to the public and accessible by a gate which could easily be opened by children and was in a part of the gardens much frequented by children. The defenders knew that the attractive berries were a deadly poison but did nothing to warn of the danger or prevent access to them. HELD: Since the berries looked like large blackcurrants and were of a very tempting appearance to a child, they constituted an 'allurement'. There was a good cause of action against the defender and the matter should proceed to trial.

37.4 **Young v. Kent CC (March 14th 2005**)

In this unreported case, the roof of a school building was held to be an allurement to children to climb onto it!

37.5 That said, the courts do not expect occupiers to take unreasonable precautions to keep mischievous children at bay.

37.6 **Liddle v. Yorkshire (North Riding) County Council [1934] 2 KB 101 (CA)**

During the course of excavating a road, workmen created a mound of soil against a wall. Children played there, but were always warned off by the workers. One afternoon, after the workmen had left, little Liddle (aged seven) decided to give his friends his bee impersonation from the top of the heap. Ah, but alas the sting! He fell off the wall during an unsuccessful flight and injured himself. It was held that the council was not liable. Liddle was a trespasser to whom the defendants owed no duty, not having constructed or placed the heap of soil where it was with a view of causing him injury, or, indeed, in contemplation of him at all.

"To make a landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children onto his land, and either did an act which caused damage with knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable."
per Scrutton LJ at p. 112

n.b. The outcome of this case might have been different under OLA 1984.

37.7 **Edwards v. Railway Executive [1952] AC 737 (HL)**

Terence Edwards, a boy of nine, went onto a railway line and lost his right arm when a train ran over it. He brought an action against the owners of the railway. Other children had been accustomed to break through the fence enclosing the line, but the fence had been repaired whenever damage was noticed. HELD: The railway owners were not liable. The boy was a trespasser and not a licensee and they were not obliged to do more than keep the premises shut off by a fence which was repaired when broken and was obviously meant to keep out intruders. *Lowery v. Walker* was distinguished on the grounds that in that case the failure of the land owner to take any steps to prevent people using his land as a short-cut probably amounted to a tacit licence.

"Repeated trespass of itself confers no licence; the owner of a park in the neighbourhood of a town knows probably only too well that it will be raided by young and old to gather flowers, nuts or mushrooms whenever they get an opportunity. But because he does not crown his park wall with a chevaux de friese or post a number of keepers to chase away intruders how is it to be said that he has licensed what he cannot prevent?... Children, small boys especially, resemble burglars; if they want to get in, they will, take what precautions you may." per Lord Goddard at p.746

And they say that today's youth is out of hand! Bring back the good old 1950's when small boys resembled burglars!

38 WHAT IS THE COMMON DUTY OF CARE?

38.1 **OLA 1957 s2 (2): The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.**

38.2 The question whether the occupier has fulfilled his duty to the visitor is thus dependent upon the facts of the case, and will vary with the circumstances.

OLA 1957 s.2 (3) The circumstances relevant for the present purposes include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases:

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

39 AN OBJECTIVE TEST

39.1 The standard of care required is that of a reasonable person. Where a defendant (such as a local council) has set its own safety standards which may be more or less stringent than the standard test, this may be informative, but is in no way determinative in relation to liability.

39.2 **Esdale v. Dover District Council [2010] EWCA Civ 409**

Mary Esdale sued for damages for personal injuries sustained when she tripped on a footpath which was the responsibility of the defendant, Dover District Council. The council had a policy to repair any flagstones that were uneven by ¾-inch or more, but the council inspector had decided that these flagstones – which just met the ¾-inch guideline – were not, in fact, dangerous and so did not have them repaired.

The judge held that the council had not been in breach of the common duty of care, despite the fact that the council had not followed its own policy guidelines. Mary Esdale appealed on the grounds that by not following its own safety guidelines, the policy was clearly in breach of its duty of care.

HELD: The test for reasonableness was not based on the criteria which might have been set by the defendant. It was an objective test based on what a reasonable person would think.

"The test of whether, in all the circumstances, the council has taken such steps as are reasonable to see that visitors are reasonably safe does not depend upon what standards of safety the council sets itself as a matter of policy. The test to be applied is an objective one. The question, in effect, is: does the judge, as the embodiment of the reasonable person, think that the council has taken such steps as are reasonable, in all the circumstances, to keep the visitor – the claimant here – reasonably safe?

"What the council sets as a policy is certainly not determinative, although I would not go so far as to say that it is irrelevant. One can immediately see that the council's policy could not be determinative. If the council had policy that footpaths need not be repaired unless there was a defect of more than two inches, no one would suggest that, if that policy were followed, it could be said that the council had taken such care as was reasonable. Conversely, if the council wished to set a very rigorous policy in an attempt to provide a high standard for its visitors, it would not follow that the standard of what is reasonable must be set at the same level." per Smith LJ at para 12

39.3 **Griffiths v. Gwynedd County Council [2015] EWCA Civ 1440**

The council was not liable to a cyclist **–** Melvyn Griffiths **–** who fell off his bike when he hit a defect in a high mountain road. Although the road had not been kept in repair according to the high standards set by the council itself, it was not in an unreasonable state of disrepair according to the usual standards expected of councils.

40 'OCCUPANCY DUTY' AND 'ACTIVITY DUTY'

40.1 Some judges distinguish between 'Occupancy Duty' and 'Activity Duty'. The former relates to the design or want of repair of the premises; the latter to activities permitted on the premises which might endanger other visitors.

Tomlinson v. Congleton Borough Council [2004] 1 AC 46

"There are two alternatives. The first is that it must be due to the state of the premises. The state of footpaths covered in ice and open mine-shafts. It will not normally include parts of the landscape, say, steep slopes or difficult terrain in mountainous areas or cliffs close to cliff paths. There will certainly be dangers requiring care and experience from the visitor but it normally would be a misuse of language to describe such features as "the state of the premises". The same could be said about trees and, at any rate, natural lakes and rivers.

"The second alternative is dangers due to things done or omitted to be done on the premises. Thus, if shooting is taking place on the premises, a danger to visitors may arise from that fact. If speedboats are allowed to go into an area where swimmers are, the safety of the swimmers may be endangered."
per Lord Hobhouse at para 69

40.2 If premises are neither in want of repair, nor entertaining an activity which might injure the claimant *other than by his own fault*, the Act will thus not apply.

40.3 **Poppleton v. Trustees of the Portsmouth Youth Activities Committee [2007] EWHC 1567 (QB)**

Gary Poppleton, aged 25, was a fit young man. He went to the Peter Ashley Activity centre in Portsmouth to do some 'bouldering' (indoor rock climbing.) He was given no instruction or supervision, and was seriously injured when he fell off the wall onto the safety matting below. The Centre Management was held to be liable in negligence for not warning him that the 'safety' matting would not sufficiently break his fall, subject to a 75% reduction for contributory negligence. However, the court held that there could be no question of Occupiers' Liability as the premises were not inherently unsafe; and there was no activity going on there – other than that being performed by the claimant himself – which put the claimant into any danger.

40.4 **Yates v. National Trust [2014] PIQR P16 (QB)**

Joe Jackson was contracted by the National Trust to fell a diseased horse chestnut tree in Morden Hall Park, near to where Barrie lives. His team comprised three tree surgeons including the claimant, Jamie Yates, then aged 22. Whist cutting through some braches about 50 feet up, Yates fell out of the tree and was rendered paraplegic. It was not clear what had happened, but it seemed likely that he had accidently sawn through his safety ropes and then fallen when the branch on which he was standing of sitting broke. He claimed, *inter alia*, that the NT was liable under the Occupiers' Liability Act 1957.

HELD: The OLA could not apply in this case as the injury was not caused by the state of the premises but by his activity as a tree surgeon.

40.5 A recent example of an 'activity duty' being breached was in the following case:

Osborne v. Bourne Leisure Ltd. (February 2019) Unreported

Rebecca Osbourne was staying in her caravan at the Haven Leisure Rockley Park Resort, near Poole in Dorset. The resort was owned by Bourne Leisure Ltd., and one of the facilities on offer was and area called the Live Lounge, where there was a bar, indoor games were played, and entertainment was provided by employees known as Funstars.

One of the Funstars, Billy Stewart, organised a game called Ad Enough, which was an adult take on Musical Chairs, in which the participants had to find an object and return with it to a chair, there being one fewer chair available in each round than participants. Osbourne participated in this game, together with a young man.

A dispute arose between Osbourne and the man as to who had returned with the shoe to the remaining chair first. Mr Stewart decided to hold a tie-break. Stewart sent Osbourne up one aisle and the man up another aisle at the opposite end of the room and told them that the first one back on the chair was the winner. Stewart started them off, with words to the effect of "first to the chair wins, one, two, three, go", and both the claimant and the man ran towards the chair, where they collided and the Osbourne was injured.

This tie-break was not approved, nor was it part of any game presented by the Funstars. It had not been subject to any form of risk-assessment. The tie-break was invented on the spur of the moment by Stewart.

It was held that Stewart was in breach of the duty under the Occupiers' Liability Act 1957. Plainly, the tie-break was not part of a "fast moving and vigorous contest" where accidents might be tolerated. The factual context in the present case was light-hearted fun, a holiday resort entertainment intended for the enjoyment of the participants and for the audience. No-one expected this game to turn into a contact sport played by trained athletes.

In this case, one of the responsibilities of Stewart was to take reasonable steps to safeguard the participants in the game. More particularly, Stewart was under an obligation, having decided to have a tie-break, to take reasonable steps to ensure the participants would be reasonably safe, by adopting appropriate procedures.

41 ALL THE CIRCUMSTANCES OF THE CASE

41.1 The amount of care that the occupier must take will vary according to the circumstances of the particular case, so similar facts may not yield the same result.

i. The slipping over cases

A series of cases involving people slipping and falling illustrates the vagaries of this subject.

41.2 **Ward v. Tesco Stores Ltd. [1976] 1 WLR 810**

A supermarket customer slipped on yoghurt from a pot that had fallen onto the floor. This sort of greasy spillage was the sort that it was reasonable to expect a shopkeeper to deal with straightaway. Tesco's were unable to prove that the spillage had only just happened and so were held to be liable for permitting the danger to persist.

41.3 An interesting feature of this case was the fact that, once it was established that a dangerous situation had arisen, it became incumbent on the defendants to prove that they had taken reasonable care to prevent the situation arising – rather than on the claimant to prove that they had not.

This reasoning was applied in **Hall v. Holker Estate Co. Ltd [2008] EWCA Civ 1422.**

41.4 **Hall v. Holker Estate Co. Ltd [2008] EWCA Civ 1422**

The claimant was on holiday at a campsite/caravan park with his 11-year-old son. The campsite owners provided various playground facilities, including a portable tubular five-a-side goal.

Whilst the claimant was keeping goal during a knockabout game of football with his son, the goal fell over onto him and smashed his jaw. The goal had not been secured in accordance with the manufacturer's safety instructions, though this may have been because campers regularly took the horseshoe pegs out to ground their tents.

The campsite owners convinced the trial judge that they regularly inspected the facilities to make sure they were safe, and that this was sufficient to fulfil their duty under the OLA 1957.

The Court of Appeal disagreed. There was clear evidence that the goal was not secured properly, and no evidence that the removal of the pegs had only just occurred. Applying *Ward v. Tesco*, the Court of Appeal held that, in the absence of a proper defence, the case for the claimants was made.

41.5 **Piccolo v. Larkstock Ltd. (t/a Chiltern Flowers) (2007) (Unreported)**

Larkstock ran a florist on a station concourse. Piccolo slipped on some petals which had fallen from a display. Larkstock claimed that they operated a reasonable 'clean as you go' system, and that it was unfair to expect any more of a small florist. Applying *Tesco v. Ward*, the court disagreed and awarded damages to the claimant.

The position of the florist on the station, where many preoccupied people passed by, meant that their purely reactive system of cleaning when alerted to a problem was insufficient. They needed to be proactive to ensure that the premises were safe at all times for passers-by. In any case, even their reactive system had not worked, as Piccolo had managed to slip on some petals, which could not have only just dropped in front of him.

41.6 **Lowe v. Cairnstar Ltd. [2020] SC Edinburgh 16**

Vikki Lowe slipped on a wet floor in the ladies' toilets at Joanna's Nightclub in Elgin, Scotland, and injured her ankle. She was wearing flat shoes and was not drunk. The floor was obviously wet, but the main problem was that the porcelain floor tiles were not sufficiently slip-resistant for a frequently wet environment such as a toilet.

The club was held to be liable, but with a 25% reduction for contributory negligence.

Compare this case to *Laverton v. Kiapasha (t/a Takeaway Supreme)* [2002] EWCA Civ 1656 below.

ii. Slipping through stupidity

41.7 The duty is only to do what is reasonable in the circumstances. It is recognised that many people who trip and fall do so entirely due to their own stupid fault!

41.8 **Laverton v. Kiapasha (t/a Takeaway Supreme) [2002] EWCA Civ 1656**

Kiapasha owned the Takeaway Supreme in Consett, County Durham. Ms. Laverton visited his establishment with her friends after a night on the town. She was an unusually overweight woman and was wearing cowboy boots. The takeaway was busy and she went to join the queue. She was somewhat the worse for drink (after about 10 double Bacardi's) and she slipped on the wet floor and broke her ankle.

The defendant claimed that he was not responsible for her accident. He had done all he reasonably could to keep the floor dry, despite the fact it had been raining heavily and the customers had been walking the water into the shop all evening. In particular he had slip-resistant tiles laid on the shop floor; he had a doormat for customers to wipe their feet on as they entered (though it was not fixed and tended to migrate across the floor); and he had a system for mopping up (two mops and a bucket).

He said he mopped up whenever practical, but at the time of the incident there were 20 or 30 people in the shop so it could not be done. Nor was there any obvious emergency as the floor was not awash with water, and the customers could avoid such accidents by taking a little care.

The trial judge held that Kiapasha was wholly liable for the accident, but this was overturned by the Court of Appeal. This case was not like Ward v. Tesco where there was a clear danger to customers which demanded instant attention. Although a wet floor can be dangerous, where the danger can easily be avoided by the customers it is not necessary to take elaborate precautions to protect them.

"The occupier's duty of care is the same in all cases but its application depends, and depends crucially, upon 'all the circumstances' of the particular case before the court. He has to take 'reasonable' care to see that his visitors are 'reasonably safe'. he does not guarantee their safety."

per Hale LJ at para. 16

"A take-away shop or other food outlet has to consider cleanliness and hygiene as well as safety. It is reasonable for him to have a tiled rather than a carpeted floor...

"It is not reasonable to expect such a surface to be kept dry at all times. If the judge was saying that the defendant should have done so, then in my view he was wrong. But wetness does increase the risk of slipping and it is reasonable to expect the shopkeeper to do something to prevent and control it. After all, there is not much the customer can do about it: she may be expected to wipe her feet on a mat but not to mop the floor. In some large businesses it may be reasonable to expect stringent precautions at the shop door, including mats large enough to absorb the moisture from large numbers of customers who do not wipe their feet and/or a member of staff stationed near the door to mop up as required...

"The question is what was reasonable to expect of the defendant in the particular circumstances of this case and whether anything else would have made a difference. In my view it would not. A doormat is a sensible precaution on both hygiene and safety grounds but it would be going too far to say that every business of this type must have a fixed doormat: many do and many do not and there are no doubt arguments either way. More importantly in the present case, unless it filled a large amount of the floor space, thus bringing a different problem, it would not eliminate the risk of enough water being brought in at very bust times to make the floor slippery. Mopping is practicable outside peak times, but has the limitations already mentioned. At busy times in a business such as this, the defendant must be right that it is simply not practicable to mop up the water as it arrives.

"The only solution would be to close the shop, which he can only be expected to do if the customers cannot otherwise be reasonably safe.

"The reality is that at such times the customers can be reasonably safe if they take reasonable care for their own safety... In my view, in that particular shop, at that particular time, it was not reasonable to expect the shopkeeper to ensure that the mat was in place and mop the floor often enough and efficiently enough to prevent its being wet, even significantly or considerably so. To suggest otherwise is a counsel of perfection imposing a near strict liability which the law does not at present do. I would therefore allow the appeal and dismiss the claim in its entirety." per Hale LJ paras 17-23

41.9 **Martin-Sklan v. Marks and Spencer plc (12.3.2008) (Unreported)**

Alexander Martin-Sklan, a 55-year-old accountant from Golders Green in Barnet, north London, claimed that he suffered a ruptured quadricep tendon when he slipped and fell in the car park of the Finchley Road branch of Marks and Spencer in June 2004.

He claimed that he found a squashed piece of grape on his shoe after the fall and that this could have been picked up inside the store or in the store's car park.

Mr. Martin-Sklan claimed £300,000 in damages over the incident, for loss of earnings, general damages and "adverse psychological effects and depression" that he suffered as a result of the injury.

However, Deputy Judge John Leighton Williams QC, ruled against him, and he was ordered to pay around £15,000 towards Marks & Spencer's costs.

41.10 **Murdock v. Scarisbrick Group Ltd. [2011] EWHC 220 (QB)**

Angela Murdock was using the spa facilities at the Scarisbrick Hotel in Southport. She slipped and fell on the floor tiles in the shower room area and hit her head on the door strip. She claimed that she should have been warned about the possibility that the shower area floor might be wet and slippery. Noting that an average of 200 people a day had used the facilities for at least the last two decades with not one reported accident, the court rejected this claim.

"Anybody walking in the area where the appellant sustained her accident would, as the photographs show, have seen clearly that there was a noticeable step into the area where there would be moist tiles. This clearly called for a level of care which must have been totally obvious and apparent to all users of this spa and the respondent cannot be held liable for the appellant's unfortunate accident."
per Silber J. at para 17

41.11 **Brown v. Lakeland Ltd. [2012] CSOH 105 (Scottish Court of Session, Outer House.)**

This case was decided under the provisions of the Occupiers' Liability (Scotland) Act 1960.

Lakeland owns a chain of 64 UK shops. The building which houses its Edinburgh store was built in 1809 and is Grade A listed. There is an eight-step staircase leading from the main entrance.

Moira Brown, aged 78, tripped and fell down the stairs as she was coming out, fracturing her ribs. She claimed Lakeland was liable as it had neither provided a handrail nor clear signage about the alternative entrances. In fact, despite the aged demographic of its customers (of whom there had been about 3 million in its ten years of trading) only one customer had ever fallen down the stairs, and he had been drunk.

Furthermore, the stairs were few and not very steep; there was no evidence that a handrail would have prevented the fall; it was not certain that the shop owners could have got permission to install a handrail on the listed staircase even if they had wanted to; and there was a perfectly serviceable disabled entrance with a handrail and a ramp around the corner.

Taking account of all the factors, it was held that Lakeland was not in breach of its duty of care under OLA.

41.12 **Glennie v. University Court of the University of Aberdeen [2013] CSOH 71 (Scottish Court of Session, Outer House)**

Eric Glennie slipped and fell whilst playing tennis on an Astroturfed court owned by the defender. He broke his ankle and claimed £200,000 in damages, alleging that his fall had been caused by an area of moss on the court. However, the defender had a reasonable system for cleaning the court of moss, and the pursuer had no evidence that there was any there at the time of his fall, let alone any that could have caused his accident. The simple fact was that Astroturf courts are always a bit slippery by their nature, and tennis players need to be careful not to slip. He just was not careful enough!

41.13 **Tacagni v. Cornwall CC [2013] EWCA Civ 702**

In the town of Hayle in Penwith, there is a metal path which slopes upwards for 100 metres, rising to be about two metres above the level of the parallel road. The path is supported by a wall, but because the wall had started to collapse, the council had built a fence next to it to support it for part of the length of the path. The fence then veered across a grassy area.

On a dark September night, Ms. Tacagni left 'The Salt' pub with her boyfriend, six and a half-pints of lager and a vodka and lime worse for wear. She was wearing flip-flops, as she ascended the path in virtual darkness without a torch, partly using the fence as a guide, which took her inadvertently off the path onto the grassy area at the edge of the ramp. Whilst trying to adjust her flip-flops, she leant on the fence, but she had actually gone beyond it. She fell seven feet into the road.

HELD: Overturning the trial judge, the Court of Appeal held that the council had not breached its common duty of care.

"In my judgment, the evidence did not warrant a finding that Penwith were unreasonable in failing to foresee as likely and guard against an accident of the type that occurred here as being likely. For my part, I cannot accept the judge's premise that it was necessary to envisage someone using the fence as a guide in these circumstances or that the reasonable person in the position of Penwith would have seen this as a likely possibility. It will be obvious to a pedestrian in following the fence, as the claimant did, after a very short time that he or she had departed the metalled path and was crossing a considerable distance of grassed area.

"With respect to the judge, and after exercising caution in assessing his evaluation of the case, I do not consider the evidence warranted a conclusion that Penwith was in breach of a common duty of care, and for those reasons I would allow the appeal and dismiss the action."

per McCombe LJ at para 22

41.14 **Wilson v. Bourne Leisure Ltd. (4.6.2015) Lincoln County Court (Unreported)**

Steven Wilson was staying at Butlin's Holiday Camp in Skegness in December 2010. Returning to his accommodation at 1.00 am, he slipped on an icy path an injured his shoulder. The ice had formed unexpectedly following a heavy rainstorm that evening, and workmen were busy gritting the paths when the claimant was approaching. They suggested that he wait until they had gritted the path up to his accommodation, but he went ahead regardless and slipped.

HELD: Although the defendants should have acted sooner in gritting the paths, the accident was caused by the claimant's own fault in venturing onto the sheet ice rather than waiting for it to be treated. The defendant had taken reasonable steps to make the claimant reasonably safe by giving him the option to wait until the paths had been gritted. Wilson had chosen to walk on the ice knowing it to be treacherous, and once he had decided to proceed, it was up to him to exercise commensurate caution.

iii. Precautions only need to be reasonable: they do not have to be absolute

41.15 **O'Rafferty v. London School of Economics and Political Science (6.12.2016) Central London County Court (Unreported)**

The claimant, Karen O'Rafferty, sought damages for personal injury and consequential loss arising out of an incident when she slipped in a shower room in premises owned by the defendant university.

During the student vacations, the defendant let out rooms in halls of residence to members of the public. The claimant stayed overnight in one of the rooms. She used a communal shower which had recently been used by other guests. She noticed that the floor in front of the shower tray was wet, although not flooded. After showering, she stepped out of the shower tray and slipped on the floor.

The claimant argued that a towelling bath mat ought to have been provided, and that she would not have fallen if one had been provided. She also submitted that the floor was slippery and therefore deficient. The defendant disputed that a bath mat was essential, but argued that one had been provided in any case and had been hanging over the shower door at the relevant time. It argued that the risk of slipping was obvious and clear to any person, and it had addressed that risk reasonably by installing slip-resistant flooring.

Held: Claim dismissed.

(1) There was no obligation under the Act to engage in any formulaic written risk assessment, nor was there any obligation to do other than satisfy the common duty of care, which involved addressing one's mind to the risk.

(2) The defendant had no duty to eliminate every foreseeable risk. The proposition advanced by the claimant would mean that all such establishments of the sort involved in the instant case would have to provide bath mats, which was an unsustainable argument. The precaution was simply not justified by the minimal risk of slipping. The risk of slipping was very small indeed, and had been properly addressed by the installation of slip-resistant flooring.

41.16 Even when precautions from the occupier are called for, they only need to be 'reasonable'.

Capitano v. Leeds Eastern Health Authority [1989] CLT 3522 (Leeds Crown Court)

Capitano was a night security officer in a building which was not used at night. He fell down a flight of stairs whilst investigating a burglar alarm. The stairs were not lit, but Capitano had been provided with a torch by his employers. It was held that there was no duty to light premises not normally used at night. The provision of a torch was enough to discharge the duty of care.

41.17 **Moores v. Snow Dome Ltd. (20.7.2004) (Birmingham CC)**

Moores had an accident during a snow-boarding lesson in an indoor skiing venue. She blamed the owners because the piste had not been sufficiently covered in snow, thus exposing ice. In fact, Snow Dome had a generally very efficient system in place for maintaining the snow cover, and there were also snow patrols who would close off any areas they considered dangerous.

It was held that there had been no breach of duty under OLA 1957. Snowboarding was not a risk-free activity and icy patches were an inherent risk. It was not reasonably practical to produce and maintain a piste in pristine condition throughout the day, and the precautions taken by Snow Dome amounted to reasonable care.

iv. Falling out of windows

41.18 **Lewis v. Six Continents plc [2005] EWCA Civ 1805 (CA)**

Christian Lewis fell out of a second-floor sash window in the Broadway Hotel, Letchworth. His counsel, Mr. Isherwood, argued that there should have been either a limiter on the window or bars to stop people from falling out. He claimed over £1 million. He did not get it.

Ward LJ agreed with the decision of Roger Ter Haar HHJ: *"I am unable to accept that argument. The duty is to take such care as is "reasonable" in all the circumstances to see that the visitor is "reasonably safe". The consequences of Mr. Isherwood's argument would be that virtually every window in every building in the land would have to be adapted so that no one could fall out. It would have to be made impossible for anybody to lean out of a window to get a better view of what is going on outside or to call to a friend in the street. I do not regard that to be a reasonable precaution to be imposed upon householders or hoteliers."* per Ward LJ at para 13

Compare this case with *Pollock v. Cahill* [2015] EWHC 2260 (QB) and *James v. The White Lion Hotel* (09.01.2020).

41.19 **Pollock v. Cahill [2015] EWHC 2260 (QB)**

Mark Pollock, who is blind, fell out of a second storey window at a friend's house. The large window to his bedroom had been left open, and he fell whilst he was looking for the door. It was held that as one of the known special circumstances of the case was his blindness, the occupiers were in breach of their duty towards him either to have the window open, or not to give him a clear warning about the window.

41.20 **James v. The White Lion Hotel (09.01.2020) Unreported**

Christopher James was killed when he fell nine metres out of a hotel window. It was surmised that he had opened the bottom section of a large sash window (which had no restrictors on it) and was sitting on the sill (which was 18 inches from the ground) to get some fresh air and to have a cigarette (albeit those two activities are somewhat in conflict). This potentially made him as trespasser, as it was a non-smoking room, but the judge did not accept that plea, and the action proceeded under the 1957 Act.

Prior to the case, the hotel owners were successfully prosecuted for breach of s.3 of the Health and Safety at Work Act 1974, the defendant accepting that the window posed a low risk to an adult occupying the room. Restrictors were subsequently added to the windows.

In the trial for breach of the Occupiers' Liability Act 1957, the court distinguished the decision in *Lewis v. Six Continents plc.*

i. The sash window in this case was inherently dangerous. Due to its low position, there was a signifiant risk of adults falling out of it when it was fully open. This was confirmed by the criminal case.

ii. There was no social value to the bottom of the window being open : if people wanted to look out or to get some air, they could look out of the separate top part of the window.

iii. The actions of the deceased had not been foolhardy or beyond sensible contemplation.

The defendants were held to have been in breach of their duty of care. The judgment is currently subject to an appeal.

"Broadly speaking, the conduct in question was in my judgment reasonably foreseeable. It was within the scope of the risk created by the defendants that a visitor may open the lower part of a window and lean out (particularly given the no smoking rule). That risk was accepted as material (it was the reason that window limiters were required). The deceased's actions cannot be described as the trial judge in Tui described the conduct in climbing from one balcony to another, as being such a foolhardy act in the eyes of any reasonable hotelier that it was beyond sensible contemplation, or beyond contemplation as a risk which required warning…

There was a high but not a very high degree of unreasonableness. It was a clear misjudgment, but was an act that others, particularly smokers, might take…

Taking all factors into account, and only by a narrow margin, I would not find that the Deceased's act in sitting on the window sill broke the chain of causation; the accident was still the direct result of the Defendant's failure to apply window restrictors to a very low window."

per HHJ Cotter QC at paras 103-105

v. The occupier's own safety

41.21 The occupier is not expected to take unreasonable risks with his own safety to protect his visitors.

Hughes (a Minor) v. Newry and Mourne DC [2012] NIQB 54

This case was decided under the provisions of the Occupiers' Liability (Northern Ireland) Order 1987.

Ciaran Hughes, aged 12, was injured when a firework exploded in his face and blinded him, having been lit by his eleven-year-old friend. He was playing on Rhinomaxillary Playing Fields in Warrenpoint, County Down, the day after a 'traditional' Halloween bonfire and fireworks party held by members of the local community.

The claimant alleged that the Council, who knew of the party – although they had no part in organising it – should have cleared the ground of unexploded fireworks afterwards, especially as the playing fields were likely to attract children.

However, the land in question was something of a no-go area, controlled by gangs and youths hostile to the Council employees, the police and the emergency services, and the court agreed that it was unreasonable to expect the council to send people in to clean up the area when they were likely to be attacked.

"The debris generated by the bonfire at the playing fields presented a danger to the public and in particular to children. The Council knew that it was likely that there would be such a danger. The defence that the Council were overwhelmed by the tradition of this bonfire and anti-social behaviour associated with it is not an attractive defence involving as it does the suggestion that the area was for a period of time out with the control of the Council and that there was no feasible assistance available to the council from the police.

"Any such defence requires careful scrutiny particularly because it is the vulnerable who suffer when control is lost. However, ultimately if the sensible precautions which ought to have been taken were not achievable then the plaintiff will not have established a breach of duty by the defendant. I consider that those precautions were not achievable in two senses. The first being that it was reasonable for the council to anticipate that its staff and the staff of contractors would be threatened, intimidated and assaulted and thereby at risk and prevented from carrying out any work at any time prior to the time at which the plaintiff was injured (that being the relevant time). The second being that is what would have occurred if the council staff or the staff of contractors had actually attempted to do anything prior to the time at which the plaintiff was injured and accordingly the staff would have had to retreat and this firework would not have been made safe." per Stephens, J. at para 26

vi. Visible hazards

41.22 The fact that a hazard is visible or has not previously given rise to a complaint is relevant, but does not in itself mean that it is reasonably safe.

Brioland Limited v. Mary Searson [2005] EWCA Civ 55 (CA)

Mary Searson, aged 82, fell down the stairs in a hotel when she tripped over the upstand (a sill sticking out of the floor). Although she would have seen the upstand had she looked down, she was looking ahead of her to find her friend in the car-park. The trial judge (Collins HHJ) found for Searson: *"So here is the claimant, who in my judgment has acted perfectly reasonably, perfectly normally, with nothing to warn her of a possible projection in the floor impeding her access to the outside, who tripped over it, and the only answer to her claim effectively is that she should have looked where she was going. But why she should have looked where she was going defeats me. It seems to me that there was no warning, no reason whatsoever why she should have expected something to be sticking up out of the floor on her way out."*

The Court of Appeal agreed with this, and further rejected an argument by the defendant-respondent that the proof of the safety of the step lay in the fact that no-one had ever complained about it before.

"Previous experience showed that a million people had passed across this sill without being injured… But the fact that no one has yet been injured goes only a very modest way to establishing that the object is not hazardous. As my Lord, Sedley LJ, pointed out in the course of argument, we know nothing about how many people have actually tripped over this upstand. Many people may have done so and been able to right themselves, or if they fell over, did not fall over with the consequences that affected Mrs. Searson. But this lady did fall over, and so far as that had an effect more serious than may have affected other people slipping, the defendant I fear has to take this plaintiff as he finds her."
per Buxton LJ at para 23

vii. Taking expert safety advice

41.23 The duty may be satisfied if the occupier takes expert safety advice.

Wattleworth v. Goodwood Road Racing [2004] PIQR 25

W died when he crashed his car into a tyre-faced bank during an amateur track day on the motor racing circuit which was owned and run by Goodwood. In constructing the track, Goodwood had taken and acted upon safety advice from experts from both the MSA (the national body which licenses motor racing venues in the UK); the RAC; and the FIA (the body governing international competitive racing events).

HELD: Goodwood was not liable. It regarded all aspects of track safety as paramount, but knew it was not expert in such matters and had reasonably relied on the advice of the experts.

41.24 **Maguire v. Sefton Metropolitan Borough Council [2006] EWCA Civ 316 (CA)**

Paul Maguire was injured whilst using an exercise machine at a gym operated by Sefton BC. He was pedaling on a resistance machine when it suddenly stopped resisting and he was thrown backwards. The council had bought the machine from the manufacturers, Precor Products Ltd., and had a maintenance contract with them. Precor had also done a pre-contractual safety check only a month before the incident. It was held that in employing safety experts, the council had taken proper steps to meet its duties under the Act.

n.b. Maguire's injuries had been agreed at only £2,545, subject to liability. Rix LJ **commented with despair that this was out of all proportion to the cost of bringing the case to the Court of Appeal.**

viii. Ignoring expert safety advice

41.25 Conversely, the duty may NOT be satisfied if the occupier has ignored expert safety advice.

Atkins v. Butlins Skyline Ltd. [2006] 1 CL 510 (Taunton County Court)

Butlins engaged a contractor to inspect and maintain a lift at one of its holiday camps. The contractor recommended that an enhance safety device called a full screen sensor should be installed to prevent the lift from closing onto any obstruction – such as a person. Butlins ignored this advice. Nine months later, Atkins, who was blind, was injured when the lift closed on his arm. This could not have happened had the device been installed. Despite Butlins producing a lift engineer to swear that the lift was safe, Atkins won. (This case also illustrates the higher duty of care that may be owed to disabled people.)

41.26 In a recent case with similar facts to *Atkins v. Butlins Skyline Ltd*, the court held that it was unreasonable to ignore previous accidents with automatic doors, even in the supposed interests of national security.

Toner v. Glasgow Airport Ltd. [2019] SC Edin 78

At Glasgow Airport, there are a series of four security doors, which open and close automatically as people go through, to ensure the correct directional flow. There was an occasional history of these doors closing on people, causing them serious injuries.

On November 12 2014, a 78-year old passenger, Mrs. Monica Cooper, was walking from the baggage hall towards customs. As Mrs Cooper was passing through one of the doors, suddenly and without warning it closed on her. Mrs Cooper was struck with force by the door, causing her to fall to the ground and sustain injuries including a head injury which was bleeding heavily. The door then continually opened and closed on her as there was no way of deactivating the doors locally: it had to be done remotely from a central control room.

Suzanne Toner, a Boarder Force officer at the airport, placed herself between the door and Mrs. Cooper to take the impact of the door until Mrs. Cooper was rescued. Toner then sued for the injuries she had sustained in this act of rescue.

The Airport authority argued, inter alia, that it was reasonable to have these doors operating as they did, because it was in the interests of national security.

It was held that there was a breach of the Occupiers' Liability (Scotland) Act 1960, notwithstanding the security function of the doors. It was foreseeable they could close on people and injure them; and the danger could easily have been mitigated by, for example, having them close more slowly, or by allowing the Border Force officers on site the ability to stop the doors themselves.

42 EXERCISE OF A CALLING

42.1 Work-people engaged in hazardous activities are expected to take reasonable precautions for their own safety.

42.2 **Roles v. Nathan [1963] 1 WLR 1117 (CA)**

The defendant was occupier of the Manchester Assembly Rooms where there had been difficulty in lighting an old coke-burning boiler and so he called in two chimney sweeps to clean it. The plaintiff chimney sweeps were twice warned about the danger of fumes and on one occasion had to be forcibly dragged out of the chimneys. They were warned by an expert not to relight the boiler until the sweep-hole and inspection chamber were sealed. When they returned to finish the work, they ignored this warning and lit the fire. They were overcome and killed by carbon monoxide fumes.

HELD: Given the warning they sweeps had had, and the specialist knowledge they should have had to guard against the dangers of their calling, the defendant was not liable for their actions.

"When a householder calls in a specialist to deal with a defective installation on his premises, he can reasonably expect the specialist to appreciate and guard against the dangers arising from the defect. The householder is not bound to watch over him to see that he comes to no harm. I would hold, therefore, that the occupier here was under no duty of care to these sweeps, at any rate in regard to the dangers that caused their deaths. If it had been a different danger, as for instance if the stairs leading to the cellar gave way, the occupier might no doubt be responsible, but not for these dangers which were special risks ordinarily incidental to their calling." per Lord Denning MR at p.1123

42.3 **Hannington v. Mitie Cleaning (South East) Ltd. [2002] EWCA Civ 1847**

Mitie Cleaning had a cleaning contract with De La Rue Cash Systems Ltd. at their factory premises in Portsmouth. Stanley Harrington was employed by Mitie to collect rubbish left around the premises and to empty it into Biffa-type skips positioned around the factory. One such skip had a lid, which could be lifted and placed just beyond the vertical, but no further, in order for the skip to be filled. Whilst filling this skip on a windy day, the lid fell down on the claimant's arm, causing him to fall off the pallet on which he had to stand to reach the bin. Harrington successfully claimed against his employers for their negligence in providing him with an unsafe system of work.

However, he was unsuccessful in his claim against De la Rue for Occupiers' Liability as they had employed specialist contractors and could reasonably expect them to protect themselves and their employees from the hazards of the job.

"On the face of it, and in such circumstances, the degree of care and want of care ordinarily to be looked for in such a visitor would be an ability safely and sensibly to empty bags or bins or refuse into skips supplied for that purpose, and that the occupiers, having hired and produced modern skips for the placing of the rubbish claimed from the factory, could expect the employers' employees, if they were not satisfied with the equipment or concerned that such equipment might prove dangerous in the conditions in which it was to be used, to bring the matter to the attention of the occupiers (whether directly or through their supervisors) so as to obtain a different type of skip." per Potter LJ at para 39

See also *Yates v. National Trust* [2014] PIQR P16 where a tree surgeon failed in his claim for falling out of a tree.

42.4 However, that does not excuse an occupier from taking precautions against obvious dangers to someone working on their premises.

42.5 **General Cleaning Contractors Ltd. v. Christmas [1953] AC 180 (HL)**

Ernest Christmas, an experienced window cleaner, was engaged by a window-cleaning company to clean the library windows of the Caledonian Club. He fell from an outside sill when a dangerously unstable sash window crashed down on his hand. It was held that the employees had negligently failed in their obligation to devise a reasonably safe system of work providing for an obvious danger, since they neither gave instructions to ensure that the windows should be tested before cleaning nor provided any apparatus, such as wedges, to prevent the windows from becoming closed. In leaving it to the initiative of individual workmen to take precautions against a common danger, the employers failed to discharge their duty.

42.6 **Salmon v. Seafarer Restaurants Ltd. [1983] 1 WLR 1264**

Gary Salmon, a fireman, attended a fire at a fish and chip shop caused by the defendants' failure to put out the light under the chip fryer before closing the shop. Whilst footing a ladder on the flat roof of the premises, Salmon was thrown to the ground and injured when the fire caused a gas explosion. The defendants claimed that the duty of an occupier of premises in relation to firemen is confined to risks which can be reasonably foreseen *other* than those which are ordinarily incidental to his job.

HELD: The defendants were liable. Notwithstanding the special training received by firemen to deal with the dangers inherent in fires, the duty owed by an occupier to an attending fireman is not limited to a requirement to protect the fireman only against special, exceptional or additional risks. If a fireman is injured despite exercising his professional skills, he may claim damages.

"Where it can be foreseen that the fire which is negligently started is of the type which could, first of all, require firemen to attend to extinguish that fire, and where, because of the very nature of the fire, when they attend they will be at risk even though they exercise all the skill of their calling, there seems no reason why a fireman should be at any disadvantage when the question of compensation for his injuries arises." per Woolf J at p.1272

43 THE DUTY OWED TO CHILDREN UNDER OLA 1957

43.1 Occupiers are more likely to be liable to children than to adults for two reasons:

i) At common law, children are more likely to be treated as 'visitors', particularly if there is an 'allurement' on the land. (See above)

ii) Under OLA 1957, an occupier must take extra care where children are concerned as he must be prepared for children to be less careful than adults: s.2(3)

43.2 However, there are limitations on the duty of care owed to children, especially if they ought to be under parental supervision.

i. The additional duty owed to children

43.3 **OLA 1957 s.2 (3) (a): An occupier must be prepared for children to be less careful than adults.**

43.4 *"It has been repeatedly said in cases about children that their ingenuity in finding unexpected ways of doing mischief to themselves and others should never be underestimated."*
per Lord Hoffmann in *Jolley v. Sutton* (below) p.1091

43.5 **Reffell v. Surrey County Council [1964] 1 All ER 743**

A schoolgirl put her hand through a glass swing door at school. It was known that the glass was insufficiently strong, but the council had a policy of replacing such glass with toughened glass only after a breakage.

HELD: The council were responsible for the injury as the safety of the pupil had not been reasonably assured.

43.6 **Jolley v. Sutton London Borough Council [2000] 1 WLR 1082 (HL)**

Sutton LBC owned a piece of grassland beside a block of flats on which they permitted children to play. A rotting boat had been left abandoned on this land for over two years. It was neither covered nor fenced off and Justin Jolley (aged 13) and his friend Karl (14) conceived a grand scheme to restore it and take it to Cornwall to sail it.

They worked on it for some weeks until one day, having jacked it up to work on the hull, Justin had his back broken when the boat fell off the jack on top of him. The trial judge found the council to be liable for Occupiers' Liability, with a 25% reduction for contributory negligence: (£621,710 plus £12,060 interest).

The Court of Appeal overturned the judgment on the basis that the plaintiff's act of propping up the boat had been a *novus actus interveniens*. However, the House of Lords restored the findings of the trial judge.

"Did the boat present a trap or allurement to the plaintiff and Karl and one which presented a danger of physical injury to them? If so, was this state of affairs reasonably foreseeable to the defendants such that they ought to have taken measures in good time to protect boys such as the plaintiff from such danger? One must keep well in mind that this case is concerned with boys aged 13 and 14... It was reasonably foreseeable that children including those of the age of the plaintiff would meddle with the boat at risk of some physical injury. So far as this accident was concerned, it is really only likely to occur if the child was a young teenage boy with strength and ability to raise the boat and prop it up.

per Lord Steyn at p.1085

Lord Steyn also made an interesting observation about the operation of precedent in such cases as this.

"In this corner of the law the results of decided cases are inevitably very fact-sensitive. Both counsel nevertheless at times invited your Lordships to compare the facts of the present case with the facts of other decided cases. That is a sterile exercise. Precedent is a valuable stabilising influence in our legal system. But, comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, viz, to identify the relevant rule to apply to the facts as found."

per Lord Steyn at p.1089

43.7 **Wardle v. Scottish Borders Council (2011) (Scottish Sheriff Principal)**

Abigail Wardle, aged 9, fell and injured her wrist whilst swinging from the rafters of a shelter in the school playground. After the incident, the school had the rafters boarded to prevent a recurrence, but claimed that before the accident it was not foreseeable that the children would have put themselves into such obvious danger or would have disobeyed the school regulations to climb into the rafters.

The court held that it was clearly foreseeable, warnings or not, that a child of nine might swing from the rafters and be injured, and given that the school had now effectively restricted access to the rafters, it could easily have done so before. The child was awarded £4,000, but with a 50% reduction for Contributory Negligence.

"It is perhaps not without significance that at a very early stage of her evidence the child in this case referred to the rafters as "the monkey bars… I would have thought that it was fairly obvious that the rafters would have been attractive to children for climbing purposes."

per Edward Bowen QC at para 13

ii. The limitations on the duty owed to children

43.8 Although children are treated with special consideration by the courts, this does not mean that they will always succeed where an adult would fail.

43.9 **Latham v. R. Johnson & Nephew Ltd. [1913] 1 KB 398 (CA)**

A three-year-old child was injured whilst playing unaccompanied on some unfenced wasteland to which the public had access. Children were in the habit of playing on the land with the sand and stone that were deposited there by the owners. The plaintiff crushed her hand underneath a stone and lost a finger.

HELD: The defendants were not liable as the stones were not inherently dangerous and there was neither an allurement nor trap nor invitation to the child.

"A child may be too young to be guilty of contributory negligence and yet old enough to tease a peaceful donkey or cow into kicking; but it cannot be said that the owner who allows adults and children alike to walk through his meadow where he turns out the ordinary quiet dairy cows is liable for injury done to the child who torments them. There must be something more than the mere normal user by ordinary animals or for ordinary purposes. There must be something abnormally dangerous in the animal introduced to create any liability for introducing it.

"If the law be as I have stated and believe it to be, there is nothing in this case to raise any liability in the defendants. There is neither allurement nor trap, invitation, or dangerous animal or thing. The use of the land for depositing stones is a normal user, and stones are no more dangerous than cows or donkeys, if indeed as much.

"It is impossible to hold the defendants liable unless we are prepared to say that they are bound to employ a groundskeeper to look after the safety of their licensees, and the result of such a finding would be disastrous for it would drive all landowners to discontinue the kindly treatment so largely extended to children and others all over the country. We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment: sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles." per Farewell LJ at p.407

Whilst agreeing with Farewell LJ, Hamilton LJ made the following point:

"A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation."
per Hamilton LJ at p.415

43.10 **Kidd v. Portsmouth City Council [2004] EWCA Civ 46**

Jade Kidd, a kid of ten, tripped in the Council's 'Community Garden' and fell against the catch on a gate, taking her eye out. She claimed that the Council were liable because the path was made of compacted hoggin (a mixture of clay and crushed flint) which was not the usual surface in a children's play area, where one finds either soft surfaces (around swings etc.) or tarmac (where children are likely to run.) The compacted hoggin was not suitable for running on and increased the chance of tripping. However, it was held that the Council were not liable. Although children frequented the garden, it was not a playground and should not be treated as such.

"The judge proceeded on the basis that the garden was not a proper playground but a community garden available to, and used by, all. It followed, he said, that he could not apply the special standards appropriate to playgrounds simply because children happened to play there. He said: 'Were I to do so, I would have to apply such standards to any area where children were known to play. This would include, for example, the rear gardens of friends and neighbours.'" per Tuckey LJ at para 7

43.11 **Armstrong v. Keepmoat Homes Ltd. (3.2.2012) (Unreported)**

A child of 12 accessed a dual carriageway by scrambling through a gap in neighbouring scrubland at the edge of land owned by the local authority. She then tried to cross the road where she emerged, despite there being no pedestrian crossing there, and was run over.

HELD: The local authority was not liable. Although the child had implied permission to wander through the scrubland, the local authority could not be liable for what she did after she emerged from it

43.12 **Richards v. Bromley LBC [2012] EWCA Civ 1476**

Emma Richards, aged 11, was injured at Langley Park School, when a swing-door banged onto her heel as she was leaving a building. The door had been in operation for thirty years with no recorded incidents, and Emma had herself used it on many occasions with no problems. However, there had been a recent incident where another pupil had suffered a slight injury when she was standing on the step leading from the door, holding the door open for a friend and the friend actually opened the adjacent door instead, which hit her on the ankle. This incident had given rise to a plan to raise the step outside the door to make such accidents less likely, but given its relative lack of urgency, the work was commissioned to take place during the forthcoming school holidays.

Emma claimed that this prior knowledge of the danger of the door meant that the council was in breach of its duty under OLA 1957 to protect her from the danger. The court did not agree. The earlier incident was of a very different kind, and did not suggest any real imperative to alter either the door or the step. The council were not liable.

"It was most unfortunate that Miss Richards should have suffered her unpleasant injury only weeks before the work was scheduled to be done. She has my sympathy. Sympathy however is an insufficient basis on which to subvert the law of tort. It needs to be understood that not every misfortune occurring on school premises attracts compensation." per Tomlinson LJ at para 15

43.13 **F (A Child) v. Sandwell MBC (10.6.2015) County Court Birmingham**

A school was not in breach of duty when a five-year-old pupil burnt his arm by shoving it behind a radiator in the school hall. In 13 years, 600,000 children had used the hall, and only one other had put his hand behind the radiator – and not been injured. The radiator was not a danger or a trap and an obligation to fit guards on all radiators in such schools was too heavy a burden to impose.

iii. The duty of parental responsibility

43.14 In the case of very young children, the courts expect their parents properly to supervise them in – or to keep them away from – dangerous places.

43.15 **Phipps v. Rochester Corporation [1955] 1 QB 450**

Ian Phipps, aged five, went to pick blackberries with his sister Yvonne, aged seven. They took a short cut across some land habitually used by children, and Ian fell into an unguarded trough which had been dug through the grassland to lay a sewer. He broke his leg and the council denied liability on the basis that he was a trespasser.

HELD: That children as a class were impliedly licensed to play on the grassland, and that the trough, though not an allurement, was a danger imperceptible to a small child of Ian's age. However, even though the infant plaintiff was a licensee on the land, the council were not liable as it ought not to have anticipated that the open space was a place in which such small children would be sent out to play by themselves. They were entitled to assume that the parents would behave in a naturally prudent manner and satisfy themselves that the land was safe before sending their children out unaccompanied.

"Knowledge is not of itself enough to constitute a licence; there is a distinction between toleration and permission. The owner of moorland or downland, for example, in any favoured part of the country may know quite well that people are walking on his land for pleasure, but he cannot be held merely by that fact to licence them to do so... There must be something more than casual trespassing by individuals who come once and perhaps never again. There must be a class of people who form something of a habit; and then one must ask oneself whether a reasonable owner would feel that unless he acted to stop the trespass, the belief would naturally be induced in those who used the land that they had his tacit permission to do so. This is a matter of degree." per Devlin J at p.455/456

43.16 **Simonds v. Isle of Wight Council [2003] EWHC 2303**

Simonds, aged five, was attending a school sports day. He left the playing field to have a picnic with his mother, who then instructed him to return to his teachers who were some distance away. Instead he went to play at 'Superman' on some swings. Unfortunately, there must have been some Kryptonite concealed nearby, because he broke his arm whilst flying off a swing.

HELD: The school was not responsible. There was no duty on them to immobilise or fence off the swings nor to warn parents of the obvious hazards of unsupervised playing on the swings. Playing fields could not be made hazard free and it would be unreasonable to impose such a duty.

43.17 **Bourne Leisure Ltd. (t/a British Holidays) v. Marsden [2009] EWCA Civ 671**

Matthew Marsden, aged two and a half, was on holiday with his parents at a caravan park. He wandered away from them and was found drowned in a lake on the site. The parents had been advised that there were lakes, streams and ponds on the site, and given a map to show their location. They claimed that the site owners were in breach of their common duty of care in not issuing better warnings or in indicating the various routes to the lakes down which children might wander. It was held that the site-owners were not liable. The danger of lakes to small children was an obvious one which did not need to be pointed out to parents. Nor was it reasonable to expect the site owners to indicate to the parents all the paths that led to the lakes.

"In the instant case it is absurd and offensive to suggest that Mr and Mrs Marsden were in any way at fault. A child may be gone in an instant. But it does not follow from the fact that they were not at fault that the defendant was in breach of its duty. The danger of the lake to a small child, should that child in fact stray, was obvious. Mr Earlam suggested that because Monarch Way pond was close to where Mr and Mrs Marsden had pitched their caravan the defendant ought particularly to have warned them of the danger of the lake should their son go to the lake unaccompanied. There were, he pointed out, warning notices attached to the rail of the lake which could be read by those who occupied the static caravans which bordered it.

"There seems to be no basis upon which it could be said that, in the exercise of reasonable care, the occupiers should have underlined or emphasised so obvious a danger. Mr and Mrs Marsden knew, as any conscientious parent would have known, that the site as a whole was dangerous to small unaccompanied children for many reasons. As conscientious parents, they did not need to be told that. They did not know of the existence of the path. There is no basis for saying that that represented any particular or hidden danger. The path did not even lead to the pond. True it is that a small wandering child might gain access to the pond via that path, but so that child could by any number of routes. In fact, there were more direct routes to the pond than that afforded by the path.

"In my judgment, there is no basis for concluding that the occupier was under any obligation, in the exercise of reasonable care, to bring to the attention of parents the existence of that pathway or the precise location of the pond, when the danger they presented to small unaccompanied children was obvious. That is all the more evident in the circumstance that the site occupier had given a plan to the parents which showed the location of the ponds as well as the stream and the beach. The judge himself drew attention to the views of the environmental health officer that there were a number of sources of danger to small unaccompanied children." per Moses LJ paras 17-19

44 DAMAGE TO PROPERTY

44.1 **<u>OLA 1957:</u> s.1 (3) (b): (The Act applies to) obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.**

44.2 Damages may be recovered not only in respect of actual damage to the property but also in respect of consequential financial loss.[12]

44.3 Notice, however, that an occupier has no duty to protect the goods of his visitor from the risk of theft by third parties unless there has been a bailment of those goods.

<u>Tinsley</u> v. <u>Dudley</u> [1951] 2 KB 18 (CA)

Theft of a motor-cycle from a pub yard was not the responsibility of the publican who did not charge for parking and knew nothing of the presence of the motorcycle.

"There is no warrant at all on the authorities, so far as I know, for holding that an invitor, where the invitation extends to the goods as well as to the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some party... The defendant here can only be fixed with liability if the inference can properly be drawn from the circumstances that there was an actual or constructive delivery of the plaintiff's motor-cycle into his safe keeping. On the facts it seems to me that clearly there was no such delivery, actual or constructive."

per Jenkins LJ at p.31

44.4 n.b. Where the injured party is a trespasser, OLA 1984 does not extend to creating liability for property damage.

[12] *AMF International Ltd. v. Magnet Bowling Ltd*. [1968] 1 WLR 1028, per Mocatta J. at p.1049

45 THE EFFECT OF WARNINGS

45.1 **OLA 1957: s.2 (4) (a): Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable to visitor to be reasonably safe.**

45.2 From this it would appear that a **sufficient** warning of the danger **will** absolve the occupier from liability, but the onus is on the occupier to show that it was sufficient in the circumstances.

45.3 **Roles v. Nathan [1963] 1 WLR 1117 (CA)**

"I am quite clear that the warnings which were given to the sweeps were enough to enable them to be reasonably safe. The sweeps would have been quite safe if they had heeded these warnings... It was entirely their own fault. The judge held that it was contributory negligence. I would go further and say that under the Act the occupier has, by the warnings, discharged his duty."

per Lord Denning MR at p.1124

"In most cases, probably, a warning of the danger will be sufficient to enable the visitor to be reasonably safe and so amount to a discharge by the occupier of his duty of care, but if, for some reason, the warning is not sufficient then the occupier remains liable... Where he has actually received a warning, the question is whether a visitor with knowledge of the danger reasonably incurred it."

Winfield p.302

46 OBVIOUS DANGERS

46.1 It is not necessary to warn visitors of obvious dangers. There is a series of cases involving young men (and one woman) diving into shallow water. In some of these cases they were visitors and in others they were arguably trespassers[13], but it made no difference either way, as even visitors may be expected not to be totally foolhardy, even if they have not been warned.

i. The shallow water cases

46.2 **Ewa Perkowski v. Wellington Corporation [1959] AC 53 (Privy Council: New Zealand)**

Wellington Corporation erected a diving board at the end of a duck-walk at the request of a swimming club. The water beneath the board was six-feet deep at high tide, and only two-feet deep at low tide. Mr. Perkowski died when he dived from the spring-board at low tide! It was held that the diving board was 'premises' which was 'occupied' by Wellington Corporation. (The case was brought by his wife, Ewa.) However, in the circumstances the Corporation was not liable as the danger of diving into shallow water at low tide was obvious and so the Corporation was under no duty to warn the plaintiff of it.

46.3 **Evans v. Kosmar Villa Holidays Ltd. [2008] 1 WLR 297**

James Evans, aged 17, claimed damages when he was rendered tetraplegic by diving into the shallow end of his Corfu hotel swimming pool at night. Although the 'no diving' signs were not at all prominent, it was held that the holiday company could not be held responsible – either in contract or tort – for the carelessness of a 17-year old who should have known better than to risk his neck in this manner.

"Kosmar's duty of care did not extend, in my judgment, to a duty to guard the claimant against the risk of his diving into the pool and injuring himself. That was an obvious risk, of which he was well aware. Although just under 18 years of age, he was of full capacity and was able to make a genuine and informed choice. He was not even seriously affected by drink." per Richards LJ at para 41

[13] The cases of trespassers diving into shallow water are considered in more detail below.

46.4 **Grimes v. Hawkins [2011] EWHC 2004 (QB)**

Kylie Grimes sued David Hawkins for £6 million for the injuries she suffered when she dived into his private swimming pool. David had gone out for an evening and had left his 18-year-old daughter Katie at home. There had been a gathering of people at the house who had been using his private swimming pool. Katie had provided swimming clothes for Kylie, who was also 18 years old, in order to use the pool. Kylie dived into the pool and hit the floor. As a result, she was rendered tetraplegic.

HELD: Claim dismissed. There had been ample opportunity for Kylie to have observed the contours of the pool when she had been swimming in the water before she had decided to dive in. In addition, the pool was properly designed, competently built and well maintained. There was nothing unusual about it and there were no hidden hazards. The pool was not unsafe for diving and the duty owed by Hawkins to Kylie under the Act did not to require the pool to be put out of bounds.

Hawkins was not required to adopt a paternalistic approach to his visitors, all of whom were adults exercising their free will in making choices about their behaviour. It was not incumbent on a householder with a private swimming pool to prohibit guests from diving into an ordinary pool where its dimensions and contours could be clearly seen. The claimant was an adult who had done something that carried an obvious risk.

46.5 **Cockbill v. Riley [2013] EWHC 656 (QB)**

Cockbill, aged 16, broke his neck and suffered tetraplegia when he dived into a paddling pool at a friend's barbecue in Manchester. It was held that the householder was not liable: there is no duty to warn a 16-year old not to dive into a paddling pool.

46.6 **Risk v. Rose Bruford College [2013] EWHC 3869 (QB)**

Andrew Risk, then aged 21, was a student at the prestigious drama school, Rose Bruford College. During an end-of-term 'Events Day' organised by the students on college premises, he took a dive into an inflatable pool – which he had filled himself – containing only two feet of water, and broke his neck. He claimed that the college was responsible under OLA 1957 for not undertaking a proper risk assessment and for not putting a tape around the pool to prevent students from diving in or at least to warn them of the dangers.

HELD: Following *Tomlinson v. Congleton Borough Council* [2004] 1 AC 46, there was no legal requirement on the college to protect the claimant from the obvious risk of diving into shallow water, especially as he had filled the pool himself and knew how shallow it was.

ii. Other obvious dangers

46.7 The rule about obvious dangers may be applied in any situation, and extends also to the implied term of taking reasonable care of holiday-makers, now imposed on Holiday Companies by the Package Travel etc. Regulations 1992. (A similar term is also implied by the Consumer Rights Act 2015.)

46.8 **Darby v. National Trust [2001] EWCA Civ 189**

Kevin Dodd went swimming in a murky pond belonging to the National Trust, which was a carrier of Weil's disease. He was playing 'hide-e-boo' which involved disappearing under the water for a few seconds, then popping up again in the same place, smiling at his children who were paddling by the edge. He did this for five minutes, then he did not re-appear! He had drowned.

His widow claimed that the NT were liable for not placing notices around the pond warning of the dangers of Weil's disease and drowning. The Court of Appeal held that there should have been warning notices about Weil's Disease, but that this was irrelevant to the case as her husband had not contracted Weil's disease. There was no need to warn adults about the dangers of drowning in deep, murky water as this was obvious. The NT were not liable.

46.9 **Lancashire County Council v. Burke [2001] EWCA Civ 1679**

Jane Burke (aged 29) was a student at Blackpool and Fylde College of Technology. She planned to take a keep-fit class, and entered a room where the chairs had been stacked to clear the floor for the class. While she was waiting for the class to begin, a stack of chairs fell and injured her.

The chairs had been stacked by the students from the previous class who had received no training for this task since it was considered to be obvious to any reasonable adult how to stack chairs. It was common practice for the students to stack the chairs, and there had never been an accident with them before. However, if the chairs were stacked the wrong way round, the stack would become unstable (as it had) and the trial judge considered that there should have been a warning given about this to either the chair-stackers or to the visitors who came within the vicinity of the potentially unstable stacks. He thus found for Mrs. Burke.

The Court of Appeal did not agree and allowed the appeal by the council.

"If one viewed the situation before any accident occurred, we suspect a reasonable person would take the following views. First, it is obvious that the chairs to be properly stacked need to have their legs properly positioned and it is obvious how to do that. Second, if they are stacked inappropriately then there is a conceivable risk that the chairs may fall and that too is obvious. Third, the likelihood is that if the chairs were going to fall, they would fall within a very short time of being stacked and it is conceivably likely that some minor incident would occur if they fell. Fourth, the obviousness is such and the degree of risk is such that a warning would be unnecessary." per Waller LJ at para 15

"It must be remembered that in the instant case one is not concerned directly with foreseeability of risk by the stacker of the chairs. He/she should foresee that if he/she stacked the chairs inappropriately there is a foreseeable risk of injury, albeit minor. The question is whether any reasonably careful member of staff at the college would contemplate that if he/she did not give some warning a student would inappropriately stack chairs and those chairs would thereafter cause injury. In our view the reasonably careful member of staff (a) would not think it likely that the chairs would be inappropriately stacked, (b) would not think it likely that the chairs would fall over spontaneously, (c) would not think it likely that if the chairs did fall over that they would cause any injury of any seriousness, and (d) would not think it likely that any warning that he/she gave would make any difference in any event."

per Waller LJ at para 18

46.10 **Fegan v. Highland Regional Council [2007] SLT 651**

In this Scottish case, it was held that an occupier of a cliff is not under any duty to warn adults not to lean too far over it in case they fall.

46.11 **Poppleton v. Trustees of the Portsmouth Youth Activities Committee [2007] EWHC 1567 (QB)**

"There being inherent and obvious risks in the activity which Mr. Poppleton was voluntarily undertaking, the law did not in my view require the appellants to prevent him from undertaking it, nor to train him or supervise him while he did it, or see that others did so. If the law required training or supervision in this case, it would equally be required for a multitude of other commonplace leisure activities which nevertheless carry with them a degree of obvious inherent risk – as for instance bathing in the sea. It makes no difference to this analysis that the appellants charged Mr. Poppleton to use the climbing wall, nor that the rules which they displayed could have been more prominent."

per May LJ at para 20

46.12 **Geary v. JD Wetherspoon [2011] EWHC 1506 (QB)**

A public house had a large open staircase with banisters each side, which were below the minimum height allowed under building regulations in force at the time. English Heritage did not want any changes to be made to the staircase and the requirement to raise the height was subsequently waived by the local authority.

Ruth Geary, who had been drinking at the pub, attempted to slide down the bannister but fell backwards and to the floor beneath sustaining very serious injury. She accepted in evidence that she was aware of the obvious risk of falling and that she had chosen to take that risk. Coulson J found that the claimant had accepted the obvious risk inherent in sliding down the banister. Given her evidence about the obvious risk that she ran, the principle of voluntary assumption of risk was fatal to her claim. The defendant owed her no duty to protect her from such an obvious and inherent risk. She made a genuine and informed choice and the risk that she chose to run materialised.

46.13 **Dawson v. Page [2012] CSOH (Court of Session Outer House) 33**

John Dawson, a self-employed courier, aged 73, slipped and injured his hand whilst delivering a package to Ruth Page's home. Page had removed herself from her property while extensive works were carried out thereto, and wooden planks had been laid as a walkway toward the back door of the property. Dawson had visited the property on two previous occasions attempting to deliver the parcel, and had used the planks as a walkway on each occasion. On the day of the accident, prior to which there had been heavy rainfall, Dawson had entered the site and left the parcel outdoors and had then walked along the planks and made his way to the back door to post a note as to the parcel's whereabouts. Dawson then returned to the planks, put his foot onto the first one, slipped and fell to the ground.

Dawson submitted that Page owed a duty to take reasonable care to ensure that people entering onto her premises did not suffer injury or damage as a result of the presence of any danger there; the existence on the site of a wet, slippery plank was a danger against which P should have taken precautions, such as closing off access to the premises or putting up a warning sign, but she did not do so.

HELD: The slipperiness of the plank and any risks associated with using it as a pathway were obvious, Dawson had stepped onto it several times over a period of a few days and had noticed, before stepping onto it, that it looked slippery, there was no hidden danger, nor anything to disguise any hazard from Dawson, the accident happened in daylight and Dawson could have avoided stepping on to it; there was, in short, nothing to make the plank a danger against which Page should have taken precautions.

46.14 **Leonard v. Loch Lomond and the Trossachs National Park Authority [2014] CSOH (Court of Session Outer House) 38**

Michael Leonard, aged 12, tripped on a hill side path in Balmaha on the east coast of Loch Lomond (taking the high road it would seem!) He fell 2.6 metres from the path down a steep bank onto a road and was injured. He claimed against the National Park Authority in that the path was beset with tripping hazards – such as exposed roots – and there was no handrail or barrier to prevent people from falling over the bank.

HELD: The tripping hazards were obvious, and it was neither necessary to warn walkers to take care (even children) nor to erect a physical barrier to protect them.

"It was, as I have already held, a path constructed to accepted and normal standards. It is self-evident that it was constructed in order to secure greater safety for those going up or down the hill by providing greater grip and stability on the ground. Had there been no such path and only mother earth there would have been obvious dangers of slipping on the hill. It also blended or merged well with the landscape and by 2006 was an established feature. There was no history of complaints about, or accidents upon, it… The path was a long-standing artificial feature which was neither concealed nor unusual and did not involve exposure to any special or unfamiliar hazard. It had become a permanent, ordinary and familiar feature of the landscape in respect of which the defenders owed no duty to Michael or anyone else under s.2(1) of the Occupiers' Liability (Scotland) Act 1960….

"Of course, by its very nature, the path in this case presented a danger in the form of the risk of tripping or slipping, but that is a risk which those venturing upon the hill must be taken to have accepted. Adapting the words of Lord Hutton in Tomlinson, it would be contrary to common sense, and therefore not sound law, to expect the defenders to provide protection to members of the public (by means of a handrail or barrier or anything else) against such an obvious danger. The fact that Michael was aged only 12 at the time is of no relevance to the issue of the existence of a duty on the defenders.

"As the circumstances of the accident have not been proved and in any event the defenders were under no legal duty to protect Michael against the risk of injury from walking on the downhill path, I shall assoilzie (acquit) the defenders." per Lord Uist at paras 25 and 26

46.17 **Edwards v. Sutton LBC [2016] EWCA Civ 1005**

The Defendant local authority appealed against a decision that it was primarily liable under the 1957Act in respect of a serious injury sustained by a visitor to one of its parks when he fell from a small ornamental footbridge onto rocks in the water below. The Court of Appeal held that the fact that the bridge had a low parapet presented, objectively, a danger from "the state of the premises" such as to give rise to a common law duty of care. However, the danger was obvious to users, and occupiers were not duty-bound to protect against obvious dangers.

The Court found that an unfenced bridge with low parapets would present more danger of a fall than a bridge with high guard rails, but there were many such unprotected bridges up and down the country. Whilst they presented, objectively, a danger such as to give rise to a common law duty of care, that did not mean that in order to discharge the duty of care, occupiers had to ensure that the bridges were not left open to visitors without guard rails or express warnings. Given that the width of the bridge, the height of the parapets, and the potential for injury had been clearly visible. Any user of the bridge would have appreciated the need to take care

46.18 **Liddle v. Bristol City Council [2018] EWHC 3673 (QB)**

A cyclist died after he and his bicycle fell into the harbour as he cycled along a former dock area now used as a public thoroughfare and access to a museum with railway tracks still present. As his wheel went over the tracks, he lost control of his bike. The judge found that there was an obvious danger and that the deceased had been able to appreciate the risk and make a genuine and informed choice, and that there was no duty to protect him from that risk.

47 LIABILITY FOR INJURIES CAUSED BY THE FAULTY WORK OF AN INDEPENDENT CONTRACTOR

47.1 **OLA 1957: s.2 (4) (b): Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.**

47.2 Thus, if the occupier hires an independent contractor whom he reasonably believes to be competent, he will not be liable if someone is injured on his premises by the contractor's incompetence, unless the work in question could easily have been checked for safety.

47.3 The occupier has two responsibilities here. The first is to ensure that s/he has taken reasonable care to appoint someone 'competent' to execute the work safely. Thus, the more the potential for a contractor to create a dangerous situation, the more the care that would need to be taken in the appointment. For example, more care would usually need to be taken to appoint a qualified electrician than in hiring a cleaner.

47.4 The second responsibility is to take reasonable steps to check that the job has been done so as not to create a danger. Where the job is highly technical (such as a hydraulic engineer servicing a lift) it may be impossible for the occupier to check the work, but s/he will have fulfilled the duty by making a careful appointment of someone it is reasonable to trust. Where the work is easy to check for safety (such as a cleaner polishing a floor) there may be a duty to conduct a physical inspection before allowing visitors onto the premises.

i. Contractors doing technical work

47.5 **Haseldine v. Daw [1941] 2 KB 343 (CA)**

Haseldine was injured in a block of flats belonging to Daw when the lift fell to the bottom of the shaft as a result of the negligence of a firm of engineers employed by Daw to repair it.

HELD: As Daw had employed a competent firm of engineers to make periodical inspections of the lift and to adjust it where necessary, he had discharged the duty owed to invitees and licensees. He could not be expected to check their work as it was too technical.

"The landlord of a block of flats, as occupier of the lifts, does not profess as such to be either an electrical or, as in this case, a hydraulic engineer. Having no technical skill, he cannot rely on his own judgment, and the duty of care towards his invitees requires him to obtain and follow good technical advice. If he did not do so, he would, indeed, be guilty of negligence. To hold him responsible for the misdeeds of his independent contractor would be to make him ensure the safety of his lift. That duty can only arise out of contract." per Scott LJ at p.356

ii. Contractors doing simple jobs

47.6 Where checking the safety of the work would be a very easy job for the occupier, it might be incumbent upon him to do so.

47.7 **Woodward v. Mayor of Hastings [1954] KB 174**

A pupil at a school fell on an icy step which had been left in a dangerous condition by a cleaner. It was held that even if the cleaner were an independent contractor, the school was still liable. The case was not like *Haseldine v. Daw* since there was no technical knowledge required to clean a step properly.

"The craft of the charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which the cleaning of a snow-covered step demands." per Parcq LJ at p.183

iii. Contractors doing dangerous work

47.8 **Ferguson v. Welsh [1987] 1 WLR 1553 (HL)**

In July 1976 Sedgefield District Council accepted a tender from John Spence for the demolition of a building on a site owned by them. Without the council's permission (which was required under the contract) Spence subcontracted the work to the Welsh brothers, James and Derek. They, in turn, employed Joseph Ferguson, who they had met in a pub! The Welsh brothers adopted highly dangerous and illegal demolition practices and Ferguson was paralysed when a wall fell on him.

HELD: Although Spence and the Welsh brothers were liable to Ferguson, the council had a water-tight defence in that it had engaged a demolition contractor whom it had reasonable grounds for regarding as competent, and there was no reason to suppose that the contractor would contravene the prohibition on sub-contracting. (Ferguson claimed from the council because the other defendants did not have the £150,000 he wanted.)

"It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work." per Lord Keith at p.1560

However, Lord Keith stated *obiter* that s.2 (4) of OLA 1957 would not afford a defence to an occupier who knew that the contractor was undertaking a dangerous activity and did not take reasonable steps to ensure that he was competent and that the work was being properly done.

"It may therefore be inferred that an occupier might, in certain circumstances, be liable for something done or omitted to be done on his premises by an independent contractor if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done... In special circumstances...where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for an occupier to take steps to see that the system was made safe." per Lord Keith at p.1560

47.9 This *obiter* was applied by the Court of Appeal.

Bottomley v. Todmorden Cricket Club [2003] EWCA Civ 1575 (CA)

A cricket club was holding its annual fund-raising event. They hired Messrs. Hindle and Read **–** who traded as 'Chaos Encounter' **–** to provide a pyrotechnic display, to be followed by a conventional fireworks display. Hindle and Read were two stunt men who revelled in dangerous outdoor stunts. The planned stunt for this event involved driving a van into an exploding fire. Some days before the event, Read approached Michael Bottomley to ask if he would be prepared to assist on a voluntary basis. Bottomley agreed, even though he had no experience of stunt work or pyrotechnics. (Good person to ask then.)

Bottomley's job was to prime two mortars (with petrol and gunpowder) and then retire to a safe distance before they were ignited. The men were to signal each other that all was safe by a thumbs-up sign (in the dark), followed by a countdown. In the event, the countdown could not be heard because of a problem with the public address system, so the men had to improvise. Thus, what was already a hazardous stunt became lethal. The mortars ignited prematurely and Bottomley suffered severe burns. He claimed £250,000.

The expert witnesses at the trial gave evidence that CE was an amateurish organisation operating in a field which required the highest degree of professionalism if danger were to be avoided. The club had not even checked to see whether the contractors were properly insured (which they were not), let alone whether they had any professional training or qualifications.

On this basis, and following the *obiter* in *Ferguson v. Welsh*, it was held that the club had not exercised reasonable care in choosing competent independent contractors, and so were liable to Bottomley.

iv. Contractors misleading the occupier as to their ability or qualifications

47.10 The occupier is generally entitled to believe that the contractor has not misled him.

47.11 **Gwilliam v. West Hertfordshire Hospitals NHS Trust [2002] EWCA 1041**

Mount Vernon Hospital held a fund-raising fair in their grounds, and hired a splat-wall from Adrian Cane, an independent contractor selected from the phone-book, operating under the name of 'Club Entertainments'. (A splat-wall involves the participants bouncing from a trampoline to be adhered by Velcro to a wall!). The hospital paid Cane an extra £100 to provide staff for the splat-wall, to ensure that the hospital would be covered by Cane's public liability insurance.

Ethel Gwilliam (aged 63!) was injured whilst using the equipment due to the faulty way in which it had been set up. She might have been entitled to £60,000 had there been adequate insurance, but the policy had expired four days prior to the incident. She accepted £5,000 from Cane, and sued the hospital for the balance, claiming that they were under a duty, as occupiers, to select responsible contractors to operate their fairground attractions, and to ensure that there was adequate public liability insurance by checking the certificate of insurance.

The fund-raising manager, Andrew Wynne, admitted that insurance was an essential element in such events, but said that he had acted reasonably to ensure that it was in place by paying a premium to the independent contractor to organise it.

HELD: The hospital was not liable. Although as occupiers of the grounds they did owe the common duty of care to Ethel Gwilliam, they had fulfilled their duty by hiring an independent contractor on whom they reasonably believed they could rely, and by taking reasonable steps to ensure that the contractor carried public liability insurance. They were not required to check the actual certificate.

n.b. The precise ratio of this case is a matter of some dispute. In *Glaister v. Appleby-in-Westmorland Town Council* [2010] PIQR P6 (CA), Toulson LJ stated that: *"It would be dangerous to draw any conclusion of general application from this case."* (para 54)

47.12 In the Glaister case itself, it was held that the Council had no duty of care to make sure they were properly insured to cover injuries suffered to a member of the public who was kicked in the face by a horse at a fair.

See *Yates v. National Trust* [2014] PIQR P16 for a discussion of what constitutes reasonable care in selecting a contractor.

48 CONTRIBUTORY NEGLIGENCE

48.1 **OLA 1957: s.2 (3): The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor.**

48.2 The **Law Reform (Contributory Negligence) Act 1945** is not expressly incorporated into OLA 1957, but judges have frequently applied it to reduce damages on the assumption that it is so incorporated.

e.g. *Bunker v. Charles Brand & Son Ltd.* [1969] above, *Stone v. Taffe* (1974) above and *Revill v. Newbery* (1996) below.

49 EXCLUSION OF LIABILITY

49.1 **OLA 1957: s2 (1): An occupier of premises owes the same duty, the 'common duty of care', to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.**

49.2 The liberty for an occupier to exempt himself from liability on business premises has been severely curtailed by the Unfair Contract Terms Act 1977 s.2 (1) and the Consumer Rights Act 2015 s.65 (1).

50 OCCUPIERS' LIABILITY TO NON-VISITORS PRE-1984

50.1 OLA 1957 did not affect the duty of an occupier to a trespasser. The original common law rule was that the occupier was only liable to a trespasser for wilful acts done with the intention of harming the trespasser or at least reckless as to his presence.

50.2 **Latham v. Richard Johnson & Nephew Ltd. [1913] 1 KB 398 (CA)**

"The owner of the property is under a duty not to injure the trespasser wilfully; not to do a wilful act in reckless disregard of ordinary humanity towards him; but otherwise a man trespasses at his own risk."
per Hamilton LJ at p.411

50.3 **Robert Addie & Sons (Collieries) Ltd. v. Dumbreck [1929] AC 358 (HL)**

A four-year-old boy was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery company. The field in which the wheel was situated was used as a playground, though colliery officials from time to time warned children out of the field. Approving the decision in *Latham v. Johnson,* Viscount Dunedin held that as the boy was a trespasser, the company owed him no duty to protect him from injury.

"The only duty the proprietor has towards the trespasser is not maliciously to injure him: he may not shoot him; he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot. Other illustrations of what he may not do might be found, but they all come under the same head-injury either directly malicious or an acting so malicious as to be tantamount to malicious acting."
per Viscount Dunedin at p.376

50.4 The rule in *Addie v. Dumbreck* (1929) was substantially modified by the House of Lords in *British Railways Board v. Herrington* [1972] which introduced the concept of a **'duty of common humanity'**.

British Railways Board v. Herrington [1972] AC 877 (HL)

The defendants owned an electrified line, which was fenced off from a meadow where children lawfully played. In 1965 the fence had been in a dilapidated condition there for several months and through it people took a short cut across the line. The defendants' station master, who was responsible for that stretch of line, was notified in April 1965 that children had been seen on it, but the fence was not repaired. On June 7, 1965, Peter Herrington, then aged six, trespassed over the broken fence from the meadow where he had been playing and was injured on the live rail. HELD: Despite the trespass by the plaintiff, the defendants were in breach of their duty to him in allowing the fence to fall into disrepair.

"The question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it. If he knew before the accident that there was a substantial possibility that trespassers would come, I think that most people would regard as culpable failure to give any thought to their safety.

"He might reasonably think, weighing the seriousness of the danger and the likelihood of trespassers coming against the burden he would have to incur in preventing their entry or making his premises safe, or curtailing his own activities on his land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action, again I think that most people would think it inhumane and culpable not to do that. If some such principle is adopted there will no longer be any need to strive to imply a fictitious licence.

"It would follow that an impecunious occupier with little assistance at hand would often be excused from doing something which a large organisation with ample staff would be expected to do."
per Lord Reid at p.899

"There was, in my view, a duty which, while not amounting to the duty of care which an occupier owes to a visitor, would be a duty to take such steps as common sense or common humanity would dictate: they would be steps calculated to exclude or to warn or otherwise within reasonable and practical limits to reduce or avert danger." per Lord Morris at p.909

50.5 Following this case, the courts rarely held that an occupier was not liable to child trespassers, although it was not clear whether they were applying an objective test (what should a reasonable occupier have done?) or a subjective test (what should the particular occupier have done?)

50.6 The Law Commission decided that no sufficiently clear principle emerged from this case, and recommended legislative action, which eventually arrived in the form of **The Occupiers' Liability Act 1984**.

51 THE OCCUPIERS' LIABILITY ACT 1984

51.1 The Occupiers' Liability Act 1984 (OLA 1984) is largely self-explanatory. The statute specifically **replaces** the earlier common law rules relating to the duty owed to trespassers, so pre-1984 cases are now of historical interest only. OLA 1984 s.1 (1).

51.2 Although all the cases under OLA 1984 deal with trespassers, the Act does not talk of trespassers but of people who are not visitors. It is possible to be neither a visitor nor a trespasser, as for example if you are exercising a right of way.

51.3 OLA 1984 does not define the basic terminology – such as 'premises' or 'occupier'. These are the same as under the OLA 1957.

51.4 The current law of OLA 1984 was examined in detail in ***Tomlinson v. Congleton Borough Council*** **[2004]** 1 AC 46 (HL).

i. Who is a trespasser?

51.5 The Act deals with situations both where the claimant has entered the premises as a trespasser, and situations where, having entered as a lawful visitor, he engages in an unauthorised activity.

51.6 **The Carlgarth [1927] P 93 (CA)**

"When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters." per Scrutton LJ at 110

51.7 **Keown v. Coventry Healthcare NHS Trust [2006] 1 WLR 953 (CA)**

Martyn Keown, aged 11, climbed the underside of an external metal fire escape, and fell from a height of about 30 feet. He was held to be a trespasser for the purposes of the Act.

"The parties accepted that Mr. Keown must be treated as a trespasser while climbing the fire escape. This was apparently on the basis that children playing in the grounds were not lawful visitors but it could also have been because this case must be the closest one will come to in real life to the example of a trespasser given by Scrutton LJ in The Carlgarth [1927]." per Longmore L.J. at para 3

51.8 **Harvey v. Plymouth City Council [2010] EWCA Civ 860**

Jonathan Harvey, a drunken youth of 21, ran across some council land to avoid a taxi-driver who was chasing him for a fare. The land was overgrown and rose above a Tesco supermarket car-park. Harvey tripped over a broken chain link fence hidden in the vegetation and down into the car-park where he suffered serious brain injuries. The trial judge awarded him damages under OLA 1957, with a 75% reduction for Contributory Negligence.

The key issue in the Court of Appeal was whether Harvey was a trespasser at the time of his accident. The land was frequented by teenagers in the evenings for smoking, drinking and sex, and he argued that as they clearly had an implied licence to be there, so did he. However, the Court of Appeal held that in running recklessly through the dark to evade a cab fare, Harvey was 'sliding down the banister' and so was a trespasser for the purposes of Occupiers' Liability. Thus, he was not entitled to any damages under OLA 1957.

"When a council licenses the public to use its land for recreational purposes, it is consenting to normal recreational activities, carrying normal risks. An implied licence for general recreational activity cannot, in my view, be stretched to cover any form of activity, however reckless."

per Carnwath LJ at para 27

ii. When is a duty owed? The three criteria.

51.9 There are three (of course) criteria to be met before a claimant is owed a duty. All three criteria must be met, though the first two will clearly inform the third.

51.10 **s.1 (3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if:**

(a) he is aware of the danger or has reasonable grounds to believe it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger or may come into the vicinity; and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

54 AWARENESS OF THE DANGER

The occupier must be aware of the danger or have reasonable grounds to believe it exists

52.1 The first issue here is that there must actually be a 'danger'. This means that the premises must be inherently dangerous. It is not enough that the trespasser puts himself in danger by misusing the premises. The courts have demonstrated a very pragmatic approach to Occupiers' Liability, emphasising the need for adults to be responsible for themselves

52.2 **Tomlinson v. Congleton Borough Council [2004] 1 AC 46 (HL)**

The Council owned and occupied a disused sand quarry which was filled with water and was used for regulated sub-aqua diving and yachting. There were clear signs around the quarry which stated: **DANGEROUS WATER: NO SWIMMING**. Despite this prohibition, people often did swim in the quarry, and there had been several cases of near drownings. The Councillors were well aware of this and employed rangers to warn people off from swimming, but to little effect. At the time of the incident leading to the case, the Councillors were considering spending £5,000 in planting reeds along the beach to deter swimmers, but they could not agree on the financing and so had not yet carried out the proposals.

Meanwhile, on May 6th 1995, John Tomlinson, aged 18, was playing in the water along with hundreds of others, when he plunged in from a standing position and struck his head on the ground with such force that his fifth cervical vertebra was driven into his spinal canal, rendering him paralysed from the neck down. As he was aware of the prohibition against swimming, he was a trespasser and so sued under OLA 1984.

At first instance, the trial judge held that the Council was not liable as they had placed warning notices all around. However, the Court of Appeal overturned this decision. All cases had to be determined according to their particular circumstances, and the question was not whether warnings had been given, but rather whether the defendant had taken such care as was reasonable in all the circumstances of the case to see that the trespasser did not suffer injury.

Although in some cases a general warning would be enough, in this case it was not. The Council knew that their warnings were not effective and they could easily have provided much better protection for the trespassing swimmers, for example by implementing the reed growing scheme.

The House of Lords, however, allowed the appeal by the Council. Diving in shallow water is an obvious danger of which the claimant should have been aware even without the warnings.

52.3 Lord Hoffmann considered various other elements of the application of OLA 1984.

i) The danger must be due to the state of the premises

If there is nothing unusually dangerous about the premises, the occupier will not be liable simply because the claimant has voluntarily engaged in an activity which has an inherent risk. In this case, the water-filled quarry was no more dangerous than any other ordinary stretch of water in England. The risk to the claimant was caused by his own activities. This would be true under OLA 1957 as well as OLA 1984.

"Mr. Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had an inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity...In the present case, Mr. Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So, the only risk arose out of what he chose to do and not out of the state of the premises."
per Lord Hoffmann at para 27

ii) There is no general duty to remove an inducement which may lead someone to take a voluntary risk

"(Counsel for the claimant) said the Council were 'luring people into a deathtrap'. Ward L.J. said that the water was 'a siren call strong enough to turn stout men's minds'. In my opinion this is gross hyperbole. The trouble with the island of the Sirens was not the state of the premises. It was that the Sirens held mariners spellbound until they died of hunger. The beach, give or take a fringe of human bones, was an ordinary Mediterranean beach. If Odysseus had gone ashore and accidentally drowned himself having a swim, Penelope would have had no action against the Sirens for luring him there with their songs. Likewise, in this case, the water was perfectly safe for all normal activities."
per Lord Hoffmann at para 28

iii) Even if the occupier knows of the danger, he only needs to offer <u>reasonable</u> protection from it to the claimant.

In determining what is 'reasonable', the same sort of considerations will apply as to breach of duty in common law negligence. In some cases, it may be reasonable on balance to offer no protection at all.

"My Lords, the majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the Council was under a duty to do what was necessary to prevent it. But this in my opinion is an over-simplification. Even in the case of the duty owed to a lawful visitor under the 1957 Act, and even if the risk had been attributable to the state of the premises rather than the acts of Mr. Tomlinson, the question of what amounts to 'such care as in all the circumstances of the case is reasonable' depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other." per Lord Hoffmann at para 34

iv) Free will

Lord Hoffmann emphasised that there was a policy consideration in not requiring occupiers of land to prevent their visitors (and trespassers) from all risky activities, as many such activities have great social value, and the world would be a poorer place if they were restricted through fear of litigation.

"I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair.

"Of course, the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.

"My Lords, as will be clear from what I have just said, I think there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ that it is 'only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability.'

"A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger, or the despair of prisoners which may lead them to inflict injury on themselves." per Lord Hoffmann at paras 45 & 46

52.4 **Rhind v. Astbury Water Park Ltd. [2004] EWCA Civ 756 (CA)**

Jamie Rhind (aged 19) was severely injured when he dived into Astbury Mere to fetch his football. He hit his head on a fibreglass container which was lying on the bed of the Mere, covered in silt. There were clear notices forbidding swimming in the Mere, so he was clearly a trespasser. However, he claimed that as the defendant knew people often messed about in the Mere, they should have checked it for dangerous foreign bodies.

The Court of Appeal held that the case could not succeed under OLA 1984 because the criterion in s.1(3)(a) had not been met.

"The appellant neither called nor was able to point to any evidence that the fibreglass container was in fact visible either from the shore or from the surface of the water. The report of Mr Gilgeous merely showed that it was identifiable on an underwater inspection of the bed of the Mere; and Mr Langstaff neither did nor could, in my judgment, properly submit that the respondents were under any obligation to carry out such an inspection." per Latham LJ at para 14

i. The child trespasser

52.5 Even children may fall foul of this strict approach.

52.6 **Baldacchino v. West Wittering Estate plc [2008] EWHC 3386**

Charlie Baldacchino, aged 14, climbed onto a navigation beacon under the control of the defendant at the beach in West Wittering, in Sussex. He dived from a height of about 12 feet into 6 feet of water and was paralysed from the neck down.

The court held that he was a trespasser on the beacon, which was self-evidently not a part of the leisure activities provided on the beach, even though Charlie had seen other people messing about on it. Charlie and his friends had been ordered off the beacon by lifeguards earlier in the day, and he knew he should not be on it.

On that basis, the court applied the OLA 1984 and the judgment of Lord Phillips in ***Tomlinson v. Congleton Borough Council.***

The judge held (i) that the beacon was not an inherent danger; (ii) that even if it had been, the defendant had no reason to suppose that the claimant would be playing on it; (iii) and that even if the defendant had known of the likely presence of the claimant, the rise and fall of the sea-level around the beacon was an obvious danger about which a warning was not required.

52.7 **Phillips v. South Eastern and Library Board [2015] NIQB 91 (High Court: NI)**

Matthew Phillips, aged 11, kicked his football over a fence into a school playground whilst the school was closed. Rather than waiting to recover the football the next day, he climbed over the wire fence and injured his hand when he slipped.

HELD: The boy was a trespasser and the fence was not inherently dangerous. Phillips had no case against the school.

52.8 **Keown v. Coventry Healthcare NHS Trust [2006] 1 WLR 953 (CA)**

Martyn Keown, aged 11, climbed the underside of an external metal fire escape, and fell from a height of about 30 feet, fracturing his arm and suffering a brain injury. It was argued that although the premises might not be inherently dangerous for an adult, they were dangerous for a child, such as the claimant.

It was held that whether otherwise safe premises were dangerous for a child was a question of fact and degree. In this case, the child was old enough to know the danger of his activity, and the risk arose not out of the state of the premises, which were safe enough for their proper purpose, but out the misuse to which the claimant deliberately chose to put them. Thus, the defendant was not liable.

"Premises which are not dangerous from the point of view of an adult can be dangerous for a child but it must be a question of fact and degree. In para 46 of the Tomlinson case Lord Hoffmann said that a duty to protect against obvious risks exists only in cases where there was no genuine and informed choice as in the case of some lack of capacity such as the inability of children to recognise danger. Thus, injury suffered by a toddler crawling into an empty and derelict house could be injury suffered by reason of a danger due to the state of the premises where injury suffered by an adult in the same circumstances might not be.

"But it would not be right to ignore a child's choice to indulge in a dangerous activity in every case merely because he was a child. Mr. Keown was 11 at the time he decided to climb the fire escape; the judge's finding was, at paras 15 and 42, that he appreciated not only that there was a risk of falling but also that what he was doing was dangerous and that he should not have been climbing the exterior of the fire escape. In these circumstances it cannot be said that Mr. Keown did not recognise the danger and it does not seem to me to be seriously arguable that the risk arose out of the state of the premises which were as one would expect them to be. Rather it arose out of what Mr. Keown chose to do." per Longmore LJ at para 12

52.9 **Keown v. Coventry Healthcare NHS Trust [2006]** has been applied in several cases.

52.10 **Siddorn v. Patel (28.3.2007) (Unreported)**

Siddorn rented a first floor flat from Patel. One side of the flat abutted a flat-roof garage, also owned by Patel, but forming no part of the tenancy with Siddorn. One night during a drunken party, Siddorn and his mates climbed through a window of the flat onto the garage roof. Siddorn fell through a skylight, which was covered only in corrugated perspex.

Siddorn claimed that Patel was in breach of his duty under OLA 1984 for not providing a more substantial cover to the skylight. The court held that he was not liable. The skylight's perspex cover was suitable for its purpose and was not inherently dangerous. Furthermore, Patel was not aware that anyone other than his own workmen would ever go onto the roof and had given no such permission to Siddorn, whom he regarded as an educated and sensible adult, unlikely to engage in such horseplay. Thus, the premises did not give rise to any danger within the meaning of OLA 1984 s.1.

52.11 **Lewis v. National Assembly of Wales (17.1.2008) (Unreported)**

Lewis, aged 14, was injured whilst motorcycling on wasteland owned by the National Assembly. The activity was common on the land, though neither approved nor forbidden by the Assembly. Lewis was thrown off his motorcycle whilst making an ill-judged attempt to negotiate a bund and ditch. He broke his spine, rendering him permanently paraplegic.

It was held that the Assembly could not be liable for this, whatever the age of the claimant. There was nothing inherently dangerous about the land: there was no physical defect or hidden danger. The accident was caused simply by the claimant's own lack of skill.

52.12 **Buckett v. Staffordshire County Council (13 April 2015) QBD (Unreported)**

Thomas Buckett, aged 16, sustained severe personal injuries while trespassing on school grounds on a weekend afternoon with a group of other youths. The group had entered the grounds to play football. They had then spent some time climbing on the low roofs of the school and breaking into and stealing from the tuck shop. Finally, in the early evening, Thomas and another youth had accessed the upper roofs and climbed over fencing separating a transverse section of flat roof from a pitched roof. The transverse section had a number of skylights that were raised above the surface and consisted of panes of unstrengthened "Georgian" wired glass.

On his return from the pitched roof, Thomas had climbed back over the fence and perched on a diagonal brace. He then jumped onto a skylight and fell through the glass. He sued the council which was responsible for the school under OLA 1984.

Held: Claim dismissed. Although it was foreseeable that youths, outside school time, would gain access to and trespass on the school grounds and even be in the vicinity of the skylights, the defendant did not owe Thomas any duty to control that activity as a trespasser. The court did not accept that the skylight, in the context of its structure, makeup and location on the roof, was a danger due to the state of the premises or things done or omitted to be done on them. The danger to Thomas was caused simply because he jumped through a skylight which could not bear his weight – and which was not designed or reasonably expected so to do.

55 KNOWLEDGE OF THE TRESPASSER IN THE VICINITY

The occupier must know or have reasonable grounds to believe that the other is in the vicinity of the danger or may come into the vicinity

53.1 The courts have adopted a strict interpretation of this requirement. It is not enough that the occupier *ought to* have discovered the presence of the trespasser. He must either actually KNOW that the trespasser is in the vicinity of the danger, or actually KNOW of facts which should have led him to that conclusion, although he cannot simply ignore ("turn a blind eye") to obvious facts to avoid liability.

53.2 **Swain v. Natui Ram Puri [1996] PIQR 442 (CA)**

The defendants were occupiers of a disused factory site in Hull. Although most of the perimeter walls were surmounted by a barbed wire fence, Carl Swain, aged nine, and his ten-year-old brother, managed to find a section of unguarded wall, and climbed over. Carl then climbed over a series of walls to get to the roof, whereupon he fell twenty-five feet through a skylight. The judge found that they were trespassers, despite their age, as they knew that they should not have been on the premises.

The boys argued that the s.1(3)(b) was satisfied as the occupier should have realised that delinquent boys would be on the roof of the factory, as the factory was adjacent to a council housing estate from which errant boys were apt to wander!

The court held that the requirement in s.1(3)(b) was more stringent than that, and that in all the circumstances of the case, the claimant had neither established that his presence was known to the defendant, nor that the defendant knew of circumstances which should have led him to that conclusion.

"In the absence of actual knowledge in the present case, the question is what inference should be drawn from the evidence. Does knowledge of the surrounding circumstances create reasonable grounds to believe that children may come into the vicinity of the factory roof? In my judgment, the expression "has reasonable grounds to believe" does not include constructive knowledge. Actual knowledge or reasonable grounds to believe must be established. That does not permit an occupier to turn a blind eye. There are some facts which, on the evidence, an occupier cannot deny. For example, the presence of footholds in the perimeter wall…"

"In considering the issue whether, upon the evidence, the occupier did have reasonable grounds to believe that children might come into the vicinity of the roof, Mr. Mackay relies upon the fact that the factory stood in an inner city area, that it had been unoccupied for several months, that it was adjacent to a large council estate where many young children lived and that boys played football on a nearby green.

"Counsel submits that, having regard to that evidence and to the common knowledge of the propensity of children to wander and to trespass, the occupiers in this case must be said to have had reasonable grounds to believe that children would come into the vicinity of the roof. The respondents rely upon the evidence that the premises were substantially fenced, albeit not intruder proof, that there were no signs of trespass to the premises or of damage upon it as a result of trespass, that there had been no reports of trespass from occupiers of neighbouring premises or from other people and the fact that the roof did not constitute an allurement and indeed it constituted an obvious, as distinct from an insidious or concealed, risk and one which should, given the discouragement offered by the perimeter wall and wiring, have deterred the boys. It is common ground that the mere fact that efforts were made to deter entry is not conclusive of the necessary belief (White v. St Albans City D.C., The Times, March 12, 1990).

"In my judgment, the judge was entitled to reach the conclusion he did upon the question whether the duty existed. Upon that evidence he was entitled to hold that the occupiers had no reason to believe that children would go on to the roof. That is particularly so when the danger contemplated is the high roof. There was no evidence of children or other persons trespassing within the perimeter of the factory at all. A fortiori there was no evidence of their being present upon the factory roofs. I would have come to the same conclusion as the judge on this question.

"The evidence did not permit a finding that the occupier had reasonable grounds to believe that children might come into the vicinity of the roof." per Pill LJ at p446/447

53.3 In deciding what reasonable grounds the occupier may have had for knowing of the claimant's presence, the court will consider all the circumstances, including the time of year and the age of the claimant.

Donoghue v. Folkestone Properties Ltd. [2003] QB 1008 (CA)

In Folkestone Harbour there is a slipway into the sea to enable the launching of boats and jet-skis. In the water by this slipway, there are seven substantial horizontal wooden beams, forming a 'grid bed' upon which a boat can be placed as the tide ebbs to gain access to the hull. This grid bed is submerged for between four and seven hours a day. During the summer, people sometimes go into the water for a swim from the slipway. As this is likely to be very dangerous, particularly with the presence of the submerged grid bed, the owners of the harbour, Folkestone Properties, placed notices stating: **'Jumping in the harbour and swimming is prohibited'.** They also hired security guards to try to stop children from ignoring this.

John Donoghue was aged 31. He was 6' 2" and very fit. He was a professional scuba diver, trained in the Royal Navy. As a diving supervisor it had been his responsibility to ascertain water depths and freedom from obstruction before authorising a dive. What on earth was he thinking of when, at midnight of December 27th, he got drunk, stripped naked and dived head-first from the slipway? He broke his neck on the grid bed and was rendered tetraplegic.

HELD: Although trespassers might have been expected to try to dive in the harbour on a summer's day, the court had to consider all the circumstances of the particular case, and the likelihood of an adult diving-specialist diving into the harbour in the middle of a freezing winter night was so remote that he was not, at that time, a person to whom the defendants owed a duty of care under the Occupiers' Liability Act 1984.

"The test of whether a duty of care exists under the 1984 Act must be determined having regard to the circumstances prevailing at the time that it is alleged that the breach of duty resulted in injury to the claimant... At the time that Mr. Donoghue sustained his grievous injuries, Folkestone Properties had no reason to believe that he, or anyone else, would be swimming from the slipway. The criterion of section 1(3)(b) of the Act was not satisfied. Folkestone Properties owed no duty to Mr. Donoghue and should not have been held under any liability for his accident." per Lord Phillips MR at para 58

53.4 **Donoghue v. Folkestone Properties Ltd. [2003]** has been applied in several cases.

53.5 **Higgs v. WH Foster t/a Avalon Coaches [2004] EWCA Civ 843 (CA)**

Higgs was a police officer. In the early hours of the morning, he was investigating a suspected stolen trailer, which had been parked in the service area of a supermarket. He entered the respondents' adjoining property (a coach park) to take up a position overlooking the service yard, and fell into an uncovered inspection pit used by Foster to inspect his coaches. As Higgs was trespassing on Foster's land, the case was decided under OLA 1984.

Higgs argued that his presence as a trespasser should have been reasonably expected first because it was so easy for a trespasser to get onto Foster's land; and secondly because Foster had security lighting, which suggested he was expecting burglars.

Applying *Donoghue v. Folkestone Properties*, the Court of Appeal held that Foster was not liable to Higgs.

"In the present case, as the appellant has not, and could not, allege that the respondent knew that he was in or might come into the vicinity of the pit, he had to establish that the respondent had reasonable grounds to believe that he either was in or might come into the vicinity of the pit. Again, the former is not suggested.

"The second requires the court to consider whether there was any material which could justify the conclusion that someone like the appellant might have gone round to the rear of the coaches into the vicinity of the pit.

***"**It seems to me that the only material which could support that contention is the assertion that because the premises could be relatively easily entered by a trespasser, that in itself established reasonable grounds for the respondent to believe that a trespasser might do so. But even if that might support a conclusion that a trespasser might do so, it does not of itself support a conclusion that in so trespassing such a trespasser might go behind the coaches. There is nothing in the nature of an allurement which could attract someone to that area; and there is nothing to suggest that the rear of the coaches would have formed a natural route for a trespasser to take from one place to another. I do not consider that the mere risk that someone might steal the coaches and perhaps go to the rear of the coaches in the course of that activity, could in itself justify the conclusion that the respondent had reasonable grounds for believing that someone like the appellant might have been in the vicinity of the pit. That could only, in my judgement, have been established if there was evidence to show that trespassers had indeed been on to the premises in the past and in doing so had trespassed on the part of the premises which exposed them to the risk of injury from the pit. In my judgment the Recorder was right to dismiss this claim; I would accordingly dismiss the appeal."*

per Latham LJ at paras 9 & 10

53.6 **Maloney v. Torfaen CBC [2005] EWCA 1762 (CA)**

Maloney, who was drunk, took a short-cut to his flat over a sloping grass verge belonging to the council. He slipped at the top of the retaining wall, and fell into the subway immediately adjacent to the wall. Even though there had been two previous incidents of such accidents (including one fatality) the court held that Maloney could not meet the criterion in s.1(3)(b). Laws L.J. quoted with approval from the decision of Denyer HHJ in the Cardiff County Court:

"The claimant has to prove that the defendants knew or had reasonable grounds to believe that at the material time, i.e., around midnight, Mr. Maloney would be in the vicinity of the grass embankment using it as a shortcut to his flat. In my view, there is no evidence that the defendants knew that persons such as the claimant late at night used the embankment as a shortcut and neither is there anything to suggest that they should have known, i.e., that they deliberately shut their eyes to the risk (see Swain v. Natui Ram Puri [1996] PIQR 442). In these circumstances, given their lack of knowledge, both actual and "shut eye', I cannot see that the defendants should have been expected to offer Mr. Maloney protection against a fall from this embankment. In other words, in the circumstances of this accident, the defendants are not in breach of any duty to the claimant under the 1984 Act." per Laws L.J. at para 20

54 PROTECTION FROM THE RISK

The risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer the other some protection.

54.1 This may be seen as the sum total of the first two criteria. If the occupier knows there is a trespasser and knows there is a danger, he might reasonably be expected to offer some protection, if only by a warning.

55 THE STANDARD OF CARE REQUIRED UNDER OLA 1984

55.1 **s.1(4): The duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.**

55.2 This is far less than the duty owed to visitors under the OLA 1957. It is not a general duty to make sure that trespassers are reasonably safe, but simply relates to the known danger.

i. Warnings to trespassers

55.3 **s.1(5): Any duty can be discharged…by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.**

55.4 Warnings are typically given by placing notices on the land, but these will be considered in the light of all the circumstances. What might be effective reasonably to deter adults might not be sufficient protection for children.

55.5 Unlike in OLA 1957, the onus appears to be on the trespasser to show that the warning was not sufficient, rather than on the visitor to show that it was.

Tomlinson v. Congleton Borough Council [2004] 1 AC 46 (HL)

"Parliament has made it clear that in the case of a lawful visitor, one starts from the assumption that there is a duty whereas in the case of a trespasser one starts from the assumption that there is none."
per Lord Hoffmann at para 38

55.6 A person who knowingly undertakes a risk, having seen the warning notice, may find that his or her claim is defeated.

Westwood v. Post Office [1973] 1 All ER 184 (CA: Criminal Division)

Norman Westwood was employed by the Post Office at a telephone exchange housed in a three-storey building with a flat roof. At one end of the roof was a lift motor room. On the door of this room was the legend: **NOTICE. Only the authorised attendant is permitted to enter.** Westwood was not an authorised attendant. Guess what happened...

It was common for employees to gain access to the roof *via* the lift motor room during their breaks although this meant climbing up through a trap-door in the floor of the room. The Post Office knew of and accepted the practice. Whilst returning one day from the roof, Westwood fell through the trap-door hole and was killed. The Court of Appeal held that Westwood was a trespasser in the lift motor room and that he was not entitled to damages as he had disregarded the warning notice on the door of the room.

n.b. This case did not concern OLA 1957 or 1984, but it illustrates the same principle.

ii. Obvious dangers do not require warnings

55.7 As with visitors, a warning may not be necessary to protect trespassers from obvious dangers.

55.8 **Ratcliff v. McConnell [1999] 1 WLR 670 (CA)**

Luke Ratcliff, a 19-year-old farming student, went with his friends for a dip in the college's open-air swimming pool at 2.30 a.m., even though they knew it was closed for the winter and that swimming was prohibited. They climbed over the gate, and Luke was severely injured when he dived into 3 feet 6 inches of water. There had been previous incidents of similar accidents, and the trial judge found for the plaintiff, holding that even though he knew that the pool was out of bounds, as long as it was accessible there should have been specific warnings against diving in at the shallow end.

The Court of Appeal overturned this decision, and found for the college.

"The relevant danger here was that if someone dived into the pool, they might hit their head on the bottom if there was insufficient water to accommodate the dive. That is a danger which is common to all swimming pools. There is no uniformity in shape, size or configuration of swimming pools. It seems to me that it is a danger which is obvious to any adult and indeed to most children who are old enough to have learnt to dive.

"Mr. Lissack sought to portray the danger here as a hidden one or something in the nature of a trap. In my judgment it was nothing of the sort. Even if the defendants knew or had reasonable grounds to believe that students might defy the prohibition on use of the pool and climb over the not insignificant barrier of the wall or gate, it does not seem to me that they were under any duty to warn the plaintiff against diving into too shallow water, a risk of which any adult would be aware."

per Stuart-Smith LJ at p.680

cf. Darby v. National Trust [2001] EWCA Civ 189

55.9 **Donoghue v. Folkestone Properties Ltd. [2003] QB 1008 (CA)**

"The obvious situation where a duty under the 1984 Act is likely to arise is where the occupier knows that a trespasser may come upon a danger that is latent. In such a case the trespasser may be exposed to the risk of injury without realising that the danger exists. Where the state of the premises constitutes a danger that is perfectly obvious, and there is no reason for a trespasser observing it to go near it, a duty under the 1984 Act is unlikely to arise for at least two reasons. The first is that because the danger can readily be avoided, it is unlikely to pose a risk of injuring the trespasser whose presence on the premises is envisaged.

"There are, however, circumstances in which it may be foreseeable that a trespasser will appreciate that a dangerous feature of premises poses a risk of injury, but will nevertheless deliberately court the danger and risk the injury. It seems to me that, at least where the individual is an adult, it will be rare that those circumstances will be such that the occupier can reasonably be expected to offer some protection to the trespasser against the risk." per Lord Philips MR at paras 33 and 34

56 OLA 1984 DOES NOT COVER PROPERTY DAMAGE

56.1 **s.1 (8): Where a person owes a duty by virtue of this section, he does not, by reason of any breach of the duty, incur any liability in respect of any loss of or damage to property.**

56.2 Property damage may still be covered under the common law, as s.1 (1) (a) says that the common law is only replaced with respect to personal injury claims and s.1 (8) applies only to breaches under s.1.

57 OCCUPIERS' LIABILITY AND NEGLIGENCE

57.1 It is common to bring alternative claims under OLA 1957 and in the tort of common law negligence, but do these basically amount to the same thing?

57.2 The issue arose (but was not resolved) in *Ogwo v. Taylor* [1987].

Ogwo v. Taylor [1987] 2 WLR 988 (CA)

A fireman was summoned to a house to put out a fire caused by the occupier, who was using a blow lamp to burn off paint under the guttering of the roof, and set fire to the roof timbers. The fireman suffered serious burns caused by the water from his hose turning into steam in the heat of the fire. He brought an action for negligence.

The trial judge, Nolan J., held that the common duty of care under the OLA 1957 and the duty in common law negligence were coextensive, and that as the common duty of care under the OLA 1957 was limited to warning a fireman of any unexpected or unusual risk of which the occupier was or ought to have been aware, such was the limit of the duty in negligence. As there was no unusual risk here, the defendants were liable neither under OLA 1957 nor for negligence.

The Court of Appeal however held that the defendant owed the fireman a duty of care under common law negligence on the same basis as would be owed to any rescuer; that is, if the injury to the fireman was a predictable consequence of the defendant's negligence in starting the fire, the defendant was liable for it, notwithstanding that the fireman was trained in fire-fighting. Thus, the defendant was liable.

On the issue of whether the duty under OLA 1957 was the same as in negligence, the Court of Appeal were rather vague. They merely said that they need not pursue the matter since common law negligence had been proved in this case and, if anything, this required a higher duty under OLA 1957.

"It is unnecessary for us to consider the Act of 1957, since it is common ground that the Act does not impose any higher duty on the defendant in the circumstances of this case than he is under at common law." per Dillon LJ at p.990

"It is common ground that the duty of the defendant to the plaintiff at common law as the person who started the fire negligently is no lower, and may well be higher, than his duty to the plaintiff as the occupier of the premises." per Neill LJ at p.995

TUTORIAL QUESTIONS

Nervous Shock

1. Finalists from a popular television talent show are giving a concert on a large temporary platform in a London park. The concert has attracted 50,000 fans and is being televised live on ITV 1 and broadcast live on Radio 1. Due to the negligence of Cowell, the chief technician, there is a massive short circuit during the finale, and the concert platform explodes, engulfing the performers in flames and throwing large chunks of metallic debris into the crowd. The performers include Will, who is seriously injured, and Gareth, who is trapped under the debris. Cowell, who is backstage, is killed.

Advise ALL the following people as to their claims in negligence against the estate of Cowell.

i) Graham is Will's homosexual lover with whom he has been living for one year. He was listening to the concert on his car radio. When the explosion happened, he raced to the hospital nearest to the park and arrived just in time to see Will being brought in on a stretcher. He suffered severe clinical depression as a result of this experience.

ii) Mary, Gareth's mother, was watching the event on live television. Immediately after the explosion, the cameras showed the debris where Gareth was previously standing. Although she could not see Gareth, Mary realised he must be trapped under the debris, dead or alive, and suffered nervous shock at the sight.

iii) Peter, Cowell's father, is a fire-officer who was sent to the scene to help with the rescue. He fought his way through the flames and pulled out the body of his son. He was not physically injured, but suffered post-traumatic stress disorder as a result of the experience.

iv) Lisa was the producer of the event on her first major assignment. She had been working up to this concert for four years, and was expecting it to make her name in the music industry. On witnessing the disaster, she suffered acute anxiety at the thought that her ambitions as a producer would now probably never be realised.

v) Britney, a 10-year-old fan of Will, was on the front row of the concert, and ran for cover as the debris fell into the crowd. She had suffered from a rare psychiatric condition since the age of seven, but her experience at the concert made this far more severe.

Nervous Shock

2. Stevenson, a brilliant engineer, has spent the last ten years developing a new high-speed train which can complete the journey from London to Manchester in less than one hour. On March 1st the train made its inaugural journey from Euston Station in London, driven by Mary Motor. Amongst the celebrity passengers were three famous singers, Tommy Track, Freddy Funnel and Claire Coupling. Stevenson did not himself make the journey, but awaited the arrival of the train into Manchester Piccadilly Station, together with a film crew making a live television broadcast of this momentous event.

The train travelled safely until it got to the approach to Manchester, when Mary Motor negligently disregarded a stop light and crashed the train into a stationary haulage carriage, causing the train to derail, fall onto its side and burst into flames. Pictures of the incident were transmitted on live television, although the cameras were not close enough for anyone watching to be able to identify particular victims.

Advise the following claimants as to their possible actions in negligence against Mary Motor:

i) Donald Diesel is the homosexual lover of Tommy Track. He and Tommy have been living together as a couple for four years. Donald was watching the live transmission at home on television and suffered from post-traumatic stress disorder as a result of seeing the accident.

ii) Felicity Funnel is Freddy's sister. She heard a report of the accident by way of a news flash on the radio. She immediately drove to the local hospital, where she saw Freddy being wheeled into the operating theatre. She was told that her brother was having emergency surgery and was unlikely to survive. She waited in the hospital waiting room until he was brought out of surgery six hours later, and then sat by his bedside for the next two days, until he died. She suffered pathological grief as result of this experience.

iii) Michael Motor is an officer with the Manchester Fire Brigade. He was called with his colleagues to the scene of the accident and pulled the body of Mary out of the burning wreckage. He recognised her as his daughter! He suffered nervous shock as a result.

iv) Lucy Luggage, aged twelve, is a member of the Claire Coupling Fan Club, and had travelled to Manchester from Edinburgh especially to see her heroine arrive on the train. She feared for her life and that of Claire as the train burst into flames and pieces of burning wreckage flew into the crowd. Lucy suffered from a rare psychiatric illness because of this experience.

v) Stevenson, the inventor, suffered from clinical depression as a result of the accident, not only because his invention been destroyed, but also because he felt responsible for the injuries to the passengers which would not have happened had he not developed the project in the first place.

Nervous Shock

3. On June 6th 2019, a parade was held in Central London, to commemorate the 75th anniversary of the Normandy Landings on 'D-Day' during World War II.

The highlight of the parade was a motorised float, with a reduced-sized, intricate replica of a British battleship of the period. On-board the 'ship' were several children from the local secondary school dressed as World War II service personnel, together with their teacher, Bernard Montgomery.

Due to the negligence of the engineer, Fred Dollmann, who assembled the float, the ship was not properly secured, and as it was driven through the town, the ship fell off the float and smashed to the ground, causing severe injuries to the occupants. It fell on top of Fred Dollmann himself as he was walking by the float, making some ongoing adjustments as it was moving.

Advise all the following claimants as to their claims in negligence against Fred Dollman.

i) Jane Montgomery is Bernard Montgomery's wife. She was on the street watching the parade go by. She saw the ship fall over, but as it had already passed her by then, she could not actually see people being injured. However, she was sure Bernard must have been injured as the ship smashed to the ground and broke into pieces. As Jane could not get through the crowd to Bernard, she raced instead to the nearest hospital. She arrived in time to see Bernard being brought in on a stretcher half an hour later, covered in blood. She suffered acute anxiety as a result of this experience.

ii) Helga Dollmann, Fred's mother, is a fire-officer who was sent to the scene to assist with the rescue. She fought her way through the wreckage in order to pull her son out. She was not physically injured, but she suffered post-traumatic stress disorder as a result of the experience.

iii) Peter is the father of George (aged 12) who was one of the students on the ship. Peter was not at the parade, but heard a report of the accident by way of a news flash on his car radio. He immediately drove to the local hospital, where he saw George being wheeled into the operating theatre. He was told that his son was having emergency surgery and was unlikely to survive. He waited in the hospital waiting room until he was brought out of surgery six hours later, and then sat by his bedside for the next two days, until George died. Peter suffered pathological grief as result of this experience.

iv) William, aged 32, was watching the parade in the street. The ship fell over right in front of him. As the debris came near to him, he feared for his life, but was not physically injured at all. He suffered a severe shock because of this, although doctors considered this to be an over-reaction to the events.

v) Thomas witnessed the event from a safe difference. He is an expert in building replicas of historical ships, who had spent the last ten years working on the construction of the replica ship, which had just been completed. He fell into despair when he saw it smash to pieces on the ground.

Private Nuisance

4. Fizz buys a large Victorian house in south London, which she has converted into four bed-sits, with a central communal living room.

In January, she rents out the first bed-sit to Andy, who is training to be an opera singer. Andy asks Fizz if he will be able to practise singing in his bed-sit. Fizz replies: “I won’t be living here. What do I care?”

Andy subsequently sings very loudly in the bed-sit almost every afternoon from 14:00 to 17:00.

In February, Fizz rents the bed-sit adjoining Andy’s to Betty, a nurse who works mainly on night shifts. Betty is frequently disturbed when she is trying to sleep during the day by hearing Andy walking about and running water in his bed-sit. She is particularly upset by the sound of him practising his singing. She drops a note through his letter-box asking him to be quiet during the day, but Andy ignores this. Thereafter, whenever she hears Andy singing, Betty bangs on his wall with a broom. One afternoon she bangs so hard that she makes his wall shake, and several of his ornaments fall off a bookshelf and are broken.

In March, Fizz rents the third bed-sit to Cole. Cole is a talented amateur jeweller, who spends much of his spare time in the evenings making trinkets to give to the people at the local charity shop to sell for their good causes. The machinery he uses to cut his stones causes electrical interference with the television pictures of Andy and Fizz, even when they are watching videotaped recordings rather than live transmissions.

In April, Fizz permits her sister, Delilah, to stay in the fourth bed-sit free of charge whilst she is looking for a flat to buy in London. Delilah is disturbed by Andy’s singing, Betty’s banging and Cole’s machinery.

In May, a fire breaks out in the communal living room due to the failure by the residents of the bed-sits to extinguish an indoor barbecue. The smoke enters the bedroom of Enid, the elderly owner of the house next door. She is woken by her heroic Siamese cat, but suffers injury from smoke inhalation.

Advise all the parties as to their possible claims in the tort of private nuisance.

Private Nuisance

5. Rupert Rigsby owns an old two-storey town-house adjoining an ambulance station. He has converted the upper floor into two bedsits, retaining the ground floor rooms to live in himself.

In April, he rented one of the bedsits to Ruth Jones, a college administrator. Six months later, the other bedsit was rented to two friends, Alan Moore – a medical student – and Philip Smith – a country planning student.

Alan and Philip were distressed to find that Ruth used her flat to house the stray cats that she often rescued from the streets. Although she made every effort to re-home these distressed felines, she often had as many as 50 cats in her bedsit at a time. The cats not only made the whole building smell extremely unpleasant, but they also tended to howl from dawn until dusk, the sound permeating Alan and Philip's bedsit like a herd of banshees.

The noise during the day particularly disturbed Alan as, being a student, he rarely got out of bed before noon.

Although Rigsby also suffered from the smell and the noise of the cats, he indulged Ruth in keeping them as he was hoping to win her affection.

Ruth was herself disturbed by the two male tenants, who would often sit up very late at night talking about life. Although they were only speaking at a normal conversational volume, the walls were so thin between their bedsits that she could hear every word in the stillness of the night.

Ruth was also annoyed when the two men bought a portable Jacuzzi, which they installed in their bedsit. Whenever they used the machine, the walls of Ruth's room vibrated so violently that the ornaments on her bookcase would fall off. Furthermore, the surge in electricity scrambled her television signal. These things also distressed Ruth's mother, Joan, who often came to stay with her at weekends.

In retaliation, Ruth bought some 'stink bombs' from a local joke shop. Whenever she heard the men powering up the Jacuzzi, she would throw a stink bomb through the letterbox in their door, in the hope that the fumes would make them switch off the Jacuzzi and vacate the bedsit.

Despite frequent arguments between the landlord and his tenants about these matters, one thing on which they were all agreed was the need to do something about the noise from the ambulance station next door, from which ambulances would leave at all times of the day and night, with their sirens blaring.

Advise the parties as to any claims they may have – or be subject to – in private nuisance.

Private Nuisance

6. Irving owns a semi-detached house which he rents to Jenny The adjoining house is owned by Kit, who lives in it with his twin sons Larry and Mike, aged seven. The party-wall of the two properties is unusually thin, and Jenny complains that she can hear Larry and Mike every afternoon as they rush around, chasing each other up and down stairs, and laughing as they play at being pirates. This disturbs Jenny especially, as she is a night-nurse who generally sleeps during the day, and the noise of the twins playing invariably wakes her up. Although she complains about this, Kit's response is: "Boys will be boys!" and he refuses to tell his children to be quiet.

In retaliation, when Jenny leaves for work at about midnight each night, she bangs all her doors closed. This causes vibrations to Kit's house which often wake Kit and his family. One night Jenny bangs her front door so hard, that she dislodges some of the plaster from Kit's wall.

Kit is also aggrieved because there is a large laburnum tree growing in Jenny's garden which overhangs into his. Apart from the fact that the tree gets in his way when he is gardening, Kit is concerned because the attractive golden flowers yield poisonous seeds, and he is scared that the boys might eat them. He has asked Jenny to have the tree removed or at least cut back out of reach of his boys, but this would be an expensive operation and Jenny claims she cannot afford to do it. She says that she will only have the tree attended to if Kit agrees to pay the entire cost himself.

Both Jenny and Kit are upset when the Royal Air Force, which has a base nearby, begins to operate practice flights over the houses for about an hour each day. Although the jet planes fly quite high above the rooftops, they are extremely loud and cause interference to the television signals in both houses. Kit is particularly concerned that the boys' hearing might be damaged by the noise.

Advise all the parties as to their rights, if any, in the law of Private Nuisance

Private Nuisance

7. Elizabeth owns an estate in London, comprising a plot of land with two large houses on it. One of the houses, and its large garden, is leased to Charles. The other house is divided into three flats, which are leased to Andrew on the top floor, Anne on the middle floor and Edward on the ground floor.

Charles complained when he discovered that the garden he had leased from Elizabeth had been contaminated over the years by a leaking sewage pipe under the ground, which Elizabeth knew about but had made no effort to repair. Although this did not present a health hazard, it made the ground unsuitable for the cultivation of vegetables, a particular hobby of Charles.

As he cannot cultivate the land, Charles has sublet part of the garden to Camilla, a traveller, who has parked her caravan on the land. Camilla often stands on Charles' garden wall throwing stones and bricks at the windows of Edward's flat, occasionally breaking them.

Anne is often disturbed by Andrew, who has the flat above hers, as the floors and ceilings are not very well soundproofed, and when she is in her flat, she can hear him walking about, talking and running water in his flat. It is particularly bad when he is in his kitchen, which is above her bedroom, as Andrew has laid down ceramic tiles, which amplify the noise of his footsteps.

Edward, who lives in the flat below Anne's, also upsets her by occasionally using his flat as a studio to make films to promote various charities. She can hear the noise of the actors and crew stomping about and shouting, and some of the electronic equipment attached to Edward's ceilings makes the floors of Anne's flat vibrate. All this is particularly bothersome to Anne's daughter, Zara, as she likes to sleep for most of the daytime so that she can be alert to go partying throughout the night.

Furthermore, the electrical impulses from the filming equipment cause a disturbance to Anne's television signal so that she cannot watch the television whilst Edward is working in his flat.

Anne asked Edward to desist. When he ignored her, she bought a powerful portable radio. She now stands outside his flat in the street, waiting for filming to start. Whenever it does so, she turns the radio up to its full-volume so that Edward is unable to continue recording.

Advise the parties as to their rights in the tort of private nuisance.

Occupiers' Liability

8. *Rohards* is a large department store in the centre of London which is owned by Monty Fairhead and managed for him by Sophie Simple. Although Fairhead frequently permits celebrity guests to visit the store after it has closed for private shopping sprees, he has specifically instructed Sophie that she must not do this without his express permission.

Whilst Fairhead is away on holiday, Sophie receives a request from David Peckham, a well-known sportsman, to be able to visit the store that evening after closing, accompanied by his friend Rebecca Loosem, with the aim of buying some expensive clothing and jewellery. Sophie is unable to contact Fairhead, but gives David permission to enter the store do the shopping.

David arrives at 21:00, accompanied by Rebecca, Billy Bouncer (David's bodyguard) and Manhattan (David's five-year-old son.) The four of them are let into the store by Sophie. Although she is surprised to see Billy and Manhattan, she smiles at them and says to Manhattan: "Now then. You must be a good boy. Don't go upstairs to the toy department, because there's an Ogre up there who eats little boys at night."

She says to all of them: "Please be careful in the store tonight and stick together. We can't take any responsibility if you are injured in any way whilst the store is closed." Sophie then shows the party into the clothing department, and fetches a selection of expensive clothes for David and Rebecca to try on. Whilst David, Rebecca and Sophie are engrossed in the clothing, both Manhattan and Billy wander away from the clothing department.

Billy goes into the in-store Beauty Parlour, where there is a Jacuzzi which has been left switched on. Billy decides to use it and gets undressed. Because the water is swirling around, he cannot tell how deep the Jacuzzi is and he dives in from the edge. In fact, it is only three feet deep, and he cracks his head open on the bottom of it.

Manhattan goes up the stairs to the toy department, hoping to see the Ogre. He finds some swings, and starts to play on them. Unfortunately, they are not nailed down, and he is injured when the frame overturns and falls on him.

Whilst Sophie is measuring David, Rebecca goes in search of a toilet. She finds that the public toilets are all locked, but she sees a door marked "Manager's Office" and assuming that there will an en-suite bathroom inside, she enters. She is mauled by the Rottweiler dog which is guarding the room.

Meanwhile, David asks Sophie if he can try on some of the jewellery he has seen in a glass case. Sophie is aware that the glass case in question had a faulty catch on it, which was causing the lid sometimes to crash down on people's hands. However, she had hired a carpenter to fix it that day, and presumed that it was now mended. In fact, the carpenter, whose number Sophie had found on a hand-written card in a newsagent's window, was both unqualified and incompetent. As David was selecting a ring from the case, the glass lid slammed down on his hand, breaking his finger and his expensive Rolex watch.

Advise David, Rebecca, Billy and Manhattan as to their rights in the law of Occupiers' Liability.

Occupiers' Liability

9. Kelly owns a pub called "The Archer" in Runcorn.

Kelly appointed her barmaid, Louise, to manage the pub for her whilst she was on holiday. However, she gave Louise strict instructions not to permit any customers into the pub or its gardens between 11.30 pm and 10.00 am.

Despite this prohibition, Louise invited her friends to join her for a party in the pub the night after Kelly left, starting at midnight. First to arrive were Donna (aged 23) and her boyfriend Gaz (aged 25), who helped themselves to two pints of lager and a packet of crisps from the bar. They were followed shortly by Janet and Jonny (both aged 24). Louise was surprised to see that they had brought their five-year-old son, Corinthian, with them, until they explained that they could not get a baby-sitter.

Louise told her guests that they should stay on the ground floor of the pub, and warned them to watch out for the trap-door to the beer-cellar which was jammed open. Corinthian asked what a 'beer-cellar' was, and Louise told him: "That's where the beer giant lives! Stay away from his door or he might catch you!"

Whilst the adults were busy sorting out their drinks, Corinthian wandered over to the beer-cellar to get a look at the giant. As he could see nothing from the trap-door, he started to descend the unlit staircase down into the cellar. Earlier that day, Louise had accidentally dropped a jar of pickles on the stairs, and had not yet cleaned them. Corinthian slipped on a pickle, and fell to the concrete floor below, cracking his skull.

Janet, who fancied herself as a singer, decided to play with the Karaoke machine. The machine was not working so Louise asked Gaz – a car mechanic – to see if he could fix it. Gaz spent half an hour rewiring it and seemed to have repaired it. However, as soon as Janet switched on the microphone, she was electrocuted by a short circuit in Gaz's wiring.

Donna, meanwhile, had gone in search of a toilet. As the downstairs toilets were locked, she wandered up the stairs to the first floor, as she knew there would be some in the private part of the building. She opened the door of the first room she came to, and was instantly set upon by Kelly's pet Rottweiler dog, which Louise was looking after.

Jonny, who was drunk by this time, had staggered into the beer-garden. He went over to the ornamental pond, and after talking to the goldfish, took off his clothes and dived in. He cracked his head on the bottom of the pond, which was only three feet deep.

Advise all the injured parties as to any action they may have in Occupiers' Liability.